Supreme Court, U.S.
FILED

No. 03-32 APR 14 2003

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2002

Stephen Neal, et al.

Petitioners,

v.

The Board of Trustees of the California State University, et al.

Respondents.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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153 pp

ISSUES PRESENTED

1. Whether schools may exclude individuals of one gender from participating in intercollegiate athletics solely so that the percentages of male and female athletes at the school matches each gender's percentage in the student body.

2. Whether a deviation from proportionality alone constitutes discrimination under Title IX, when females who express an interest in participating in athletics already have a greater chance of doing so than males.

3. Whether the present administrative interpretation of Title IX is consistent with the statute, its regulations, and the Equal Protection Clause.

4. Whether information on the athletic interests of male and female students is relevant in Title IX cases and therefore discoverable under Federal Rules of Civil Procedure, Rule 26(b)(1).

PARTIES

The petitioners in this case are Stephen Neal, David Afoa, Jonathan Archuleta, Nick Bradley, Brent Cameron, Elizar Ceballos, Matt Corona, Raphael Davis, Ruben DeLeon, Don Delfin, Moses Delfin, Josh Factor, Jeff Gardner, Lionel Halsey, Max Harris, Brad Hull, Thomas Juarez, Brett Lobel, Kevin Means, Mike Mendoza, Jason Merrell, Kirk Metz, Ian Nelms, Robbie Odell, Tito Ortiz, Josh Ready, Jason Riley, Taylor Schmidt, Max Schurkamp, Andy Varner, Larry Vasquez, Nathan Vasquez, Joe Younan, Seba Clemente, Erin Kelly, Natalie Morrow, Friends of Bakersfield Wrestling, Kern County Wrestling Association, National Wrestling Coaches Association, and the CSUB Wrestling Team.

The respondents are The Board of Trustees of the California State University; California State University, Bakersfield (CSUB); Barry Munitz, (former) Chancellor of the California State University; Tomás Arciniega, CSUB President; and Rudy Carvajal, CSUB Athletic Director. Mr. Munitz, Mr. Arciniega, and Mr. Carvajal are parties in their individual and official capacities.

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OPINIONS BELOW

The opinions of the Ninth Circuit Court of Appeals affirming the District Court's order granting summary judgment (*App. 064-066*) and denying Petitioners' Petition for Rehearing and Request for Rehearing En Banc (*App. 066*) are not reported. The Ninth Circuit opinion vacating the District Court's order granting a preliminary injunction (*App. 006-021*) is reported at 198 F.3d 763 (9th Cir. 1999). The following District Court orders are not reported: (1) granting in part and denying in part CSUB's motion to dismiss; (2) granting petitioners' request for a preliminary injunction (*App. 001-008*); (3) granting in part and denying in part petitioners' motion to compel discovery and (4) denying petitioners' motion to reconsider the district court's discovery ruling (*App. 021-025*).

JURISDICTION

The judgment of the Court of Appeals was entered on January 21, 2003. *App. 093-094*. The Court of Appeals denied petitioners' Petition for Rehearing and Request for Rehearing En Banc on January 14, 2003. *App. 066*. Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

United States Constitution, 14th Amendment, Section 1; Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 *et seq.*, 34 C.F.R. §106.41. These provisions are set forth at *App. 067, 067-068, 069-070*.

STATEMENT OF THE CASE

I. INTRODUCTION

This case challenges the legality of a university eliminating males from college athletic teams so that the gender composition of the school's athletes matches the gender composition of its student body. This now-common practice is designed to satisfy the current administrative interpretation of Title IX of the Education Amendments of 1972 (20 USC §1681 *et seq*). That interpretation effectively requires schools to attain "gender proportionality" between their athletic programs and their student bodies.

This interpretation is directly contrary to the language of Title IX and its regulations, which prohibit exclusion or discrimination based on gender. One of Congress' primary stated goals in drafting the statute was to ban quotas, and Congress included a section in Title IX for that express purpose. As for Title IX's regulations, they require schools to provide equal athletic opportunity to members of both sexes. And the regulations judge equal opportunity by the *accommodation of the athletic interests* of male and female students, not by comparing the gender makeup of a school's athletes to that of its students. For almost twenty years after Title IX was passed, the responsible administrative agencies interpreted the statute and regulations as requiring schools to accommodate the interests of members of both sexes equally. In fact, the agency charged with enforcing Title IX stated in its 1979 Policy Interpretation that *equal accommodation of interest* was the "governing principle" in satisfying the regulatory provision related to equal opportunity to participate in intercollegiate athletics (34 CFR §106.41(c)(1)).

Over the past ten years, the administrative interpretation of Title IX has changed radically. Student interest is no longer considered in assessing compliance under the statute. Instead, schools are effectively required to attain proportionality, and male athletes may be eliminated solely to create proportionality. Since females now represent about 57% of the country's undergraduate students, schools have been eliminating scores of male athletes in an effort to reduce their numbers to levels lower than those of females, even though substantially more males express an interest in athletic participation. The standard of equal accommodation of athletic interests has thus been

replaced by a quota which violates the plain language of Title IX and the regulations.

At the heart of the new interpretation of Title IX is an Orwellian redefinition of the terms "equal" and "opportunity". The Department of Education's Office of Civil Rights (OCR)[1] has explicitly redefined the word "opportunity" to mean "actual participants". In accordance with this definition, OCR counts slots on women's teams as opportunities only if they are filled. Unfilled slots are not considered opportunities. And OCR gives the term "equal" the non-standard meaning of "proportional to the gender makeup of the student body." The resulting concept of "equal opportunity" leads to absurd results that are patently contrary to the letter and spirit of Title IX.

This case concerns the most extreme distortion of Title IX occurring today: the elimination of male athletes solely to create proportionality -- when females already have more athletic opportunity than males. Petitioners here are members of the varsity wrestling team at California State University, Bakersfield (CSUB), and several wrestling organizations. They filed suit to enjoin CSUB from reducing the number of male athletes on its wrestling team by imposing squad size limits ("caps"). It is undisputed that the sole purpose and effect of the caps was to attain proportionality between CSUB's athletic program and its student body, which is about 64% female. The caps do *not* redress lower opportunity for females, since females at CSUB have significantly more athletic opportunity than males to begin with. Females have nine varsity teams; males have six teams. The women's teams are not capped; the men's teams are capped at levels that are lower than their normal squad sizes, and lower than the requested *minimum* squad sizes for corresponding female teams. Women's teams also have more scholarships and operating budget than corresponding men's teams. Overall, females are about 60% of the total athletes at CSUB, even though the school's own athletic interest surveys show that substantially more males than females want to play a varsity sport. CSUB's reduction of male athletes thus started from a situation where males already had less opportunity than females. Perhaps worse, the caps reduce male opportunities

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[1] OCR has been the agency responsible for Title IX enforcement since 1980, when it replaced the Department of Health, Education & Welfare (HEW).

without providing any benefits to females, since the caps do not have the purpose or effect of shifting resources to women's teams. CSUB's reduction of the squad sizes of its men's teams thus does nothing to increase females' athletic participation.

CSUB's elimination of male athletes violates Title IX's prohibition on exclusion based on gender, and the regulations' requirement that schools accommodate the athletic interests and abilities of both sexes equally. CSUB's actions also violate this Court's standards under the Equal Protection Clause.

The Ninth Circuit has ruled that CSUB's actions do not violate Title IX because they were "remedial". *Neal v. Board of Trustees*, 198 F.3d 763, 765 (9th Cir. 1999). This position is contrary to the statutory language, which precludes a conclusion that a mere deviation from proportionality constitutes discrimination. It is also contrary to CSUB's stipulation that it is aware of no discrimination against females, or lesser opportunity for them. *See, App.080-081; Excerpt of Record on Appeal (ER) 3385.* In fact, females at CSUB who indicate an interest in playing a varsity sport have significantly more opportunity to do so compared to males. This situation is the norm throughout the California State University (CSU) system: Females on the 19 CSU campuses have a total of 151 varsity teams; men have 119. *ER 0997.* Females are about 54% of the varsity athletes in the system, even though significantly more males than females express an interest in playing sports. Nationally, females have about 600 more varsity teams than males, according to the most recent data of the National Collegiate Athletic Association.

The relief petitioners seek in this case would not reduce athletic opportunities for females. Petitioners are not asking the courts to order CSUB to reduce the number of women's teams at CSUB, and shift resources to males. Rather, petitioners merely seek a halt to the artificial capping of male teams solely to create proportionality. If the actual language of Title IX and its regulations is to be given any affect at all, males should not be eliminated simply to satisfy quotas.

II. FACTUAL AND PROCEDURAL BACKGROUND

The undergraduate student body at California State University, Bakersfield (CSUB) is approximately 64% female and 36% male. CSUB has had an intercollegiate athletics program since the early 1970s. In 1982, when CSUB had six men's teams and four women's teams, it surveyed athletic interest among its students. The survey indicated interest in three additional sports for both men and women. Two sports were subsequently added for women (softball and swimming); one sport was added for men (swimming).

By 1990, CSUB offered seven sports for men and six for women, and planned to add an additional women's team in the near future. According to CSUB's athletic director, the university was then offering "comparable" athletic opportunities for male and female students. *ER 2798-2799.* In 1991, when CSUB's state funding was reduced, it dropped *two* men's teams (tennis and cross-country) with a total of *nineteen* male athletes, and *one* women's team (cross-country) with *five* female athletes.

In 1990 and 1993, CSUB submitted required reports on male and female athletic opportunity to the California state legislature. In both reports, CSUB stated the following about its athletics program: (1) the levels of athletic competition available at the school were "effectively accommodating the interests and abilities of ***both*** sexes" (*ER 2750, 2762*) (emphasis added); (2) funds for athletic programs were equitably distributed (*ER, 2751 2763*); and (3) there were ***no*** "barriers or deterrents to provision of equitable treatment of men and women athletes" (*ER 2752, 2764*). By 1992, CSUB had five men's athletic teams and five women's teams. Since then, women have had an equal or greater number of teams compared to males. *ER 0915-0916, 4001.*

In 1993, respondents represented in court that the CSU system overall offered athletic opportunities to its female students that were "equal to, or in excess of" their percentage among eligible women in the pool from which CSU drew its students. *ER 2805-2806.* Female students, however, did not use all the athletic opportunities available to them: many women's teams had unfilled positions, despite the efforts of coaches to recruit as many women as possible.

Although CSU offered roughly equal varsity athletic opportunities for males and females by 1993, significantly

more men indicated interest in athletics. For example, 62.6% of CSU's students who regarded athletics as "very important" were male; 37.4% were female. *ER 2814, 2823, 2829* . Despite the fact that males were a minority of CSU's students, they participated in club and intramural sports (open to anyone who wants to play) in dramatically greater numbers than females at CSU campuses. In most cases, males' participation in intramural and club teams exceeded their percentage among the schools' varsity athletes. Males tried out for CSU's varsity teams without being recruited or given scholarships (i.e., "walked on") at a much higher rate than did females. *ER 2835, 2839, 2844-2845,* .

While females at CSUB have had an equal or greater number of varsity athletic teams compared to males since 1992 (*App. 302-304*), significantly more males tried out for the men's teams. Females have therefore comprised a lower percentage of CSUB's athletes than its students. To change this situation, in 1994 CSUB began capping the number of males allowed on its athletic teams, while requesting that the women's teams meet specified *minimum* squad sizes. The caps on the men's teams were lower than the *minimums* on the companion female teams, and forced the men's teams to reduce their squad sizes. CSUB has never capped any female team. Rather, it has encouraged the women's teams to have as many athletes as possible. Despite this, the women's teams have frequently been unable to achieve their requested minimums. *ER 0922, 0962, 0912, 0915, 0918, 0963.*

CSUB's sole purpose in reducing its number of male athletes was to create gender proportionality between its athletes and students in order to comply with a Consent Decree modelled after the Department of Education's Office of Civil Rights (OCR) proportionality test for Title IX compliance. CSUB has stipulated that other factors -- including financial ones -- played no role in setting the caps. *App. 080-081.*

By the 1997-98 academic year, females had 8 varsity teams to 6 for males; and females were about 57% of the school's varsity athletes -- even though CSUB's own surveys of current and prospective students showed that more males than females expressed an interest in participating in varsity athletics.[2]

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[2] More males expressed interest in athletics in *absolute* numbers, even though they represented a little over one-third of the survey respondents (and about the same percentage of CSUB's students). This was because

In August 1997, CSUB reduced the size of the wrestling team to 25 males, forcing the team to cut seven male athletes. Eliminating these athletes actually resulted in a net financial *loss* for the university, since a number of the athletes who were cut left CSUB, taking with them thousands of dollars annually in tuition and other payments. *ER 2927, 3038.*

In February 1999, District Court judge Robert E. Coyle granted the wrestlers' request for a preliminary injunction prohibiting the caps on CSUB's men's teams. Judge Coyle concluded that eliminating males simply to create proportionality violated Title IX. *App. 001-006.*

A three-judge panel of the Ninth Circuit reversed, holding that CSUB's reduction of male athletes was a "remedial action" permitted by Title IX.[3] *Neal v. Board of Trustees*, 198 F.3d 763, 765 (9th Cir. 1999). Upon remand, plaintiffs moved to lift a partial stay on discovery pending appeal. The District Court granted the motion in part, but disallowed further discovery on student athletic interest, on the ground that this information was no longer relevant in light of the Ninth Circuit's ruling. *App. 006-021.* The District Court denied plaintiffs' motion to reconsider. *App. 021-025.*

Both parties moved for summary judgment on the central issue of the legality of eliminating male athletes solely to create proportionality. The record included stipulations stating the following: (1) The only reason CSUB had reduced the numbers of males on its athletic teams was to create gender proportionality. The caps were not motivated by financial considerations. (2) CSUB was aware of no allegations that its

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the *percentage* of male respondents expressing athletic interest was about twice as high as that of females: In 1996, 31% of the male respondents expressed interest in athletic participation; while only 15% of female respondents expressed such interest. The 1997-1998 survey showed that 63.1% of CSUB's prospective students indicating athletic interest were male; 36.9% were female. For current students, those expressing interest were 68.3% male; 31.7% were female.

[3] The panel stated that Judge Coyle had "determined that regulations promulgated pursuant to Title IX ... violated Title IX." *Neal* at 765. This was incorrect. Judge Coyle's preliminary injunction ruling held that the *proportionality test*, which is *not* part of the regulations, was inconsistent with Title IX and the regulations. *App. 001-006 at 002.*

athletic program had discriminated against females, or provided them lesser opportunity than males. *App. 80-81.*

At the time the parties moved for summary judgment, females had 9 varsity teams, men had 6; females were about 60% of CSUB's varsity athletes (although more males than females expressed an interest in playing a varsity sport); males indicating an interest in playing had substantially less opportunity to do so compared to females; and female teams had significantly more scholarships and larger budgets than male teams, both overall and in team-to-team comparisons.

The District Court granted defendants' summary judgment motion, and denied plaintiffs' motion, based on the previous Ninth Circuit preliminary injunction ruling. The same three-judge panel of the Ninth Circuit that had reversed the District Court's preliminary injunction affirmed summary judgment for defendants. The panel's summary affirmance incorporates its previous preliminary injunction ruling, and states that nothing in the more-developed factual record affected their prior ruling. The panel also affirmed the denial of discovery related to student athletic interest, stating that student athletic interest is "not at all relevant" in determining compliance with Title IX. *11-26-02 Memorandum Opinion, App. 064-066 at 066.*

III. RELEVANT STATUTORY AND REGULATORY FRAMEWORK

Statutes

Title IX became law in 1972, and is codified at 20 U.S.C. §1681 et seq. Section 1681(a) states as follows:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

Congressional sponsors of the language that became §1681(a) repeatedly stated that they opposed quotas, that Title IX did not contain or require quotas; and that the bill was aimed at eliminating quotas, which were seen as *discriminatory. See, Statements of Sen. Bayh, Cong. Rec., Vol. 117, Part 23, 30404-30409 (App. 070-072); Cong. Rec.,*

Vol. 118, Part 5, 5812-5813 (App. 076-077 Rep. Green, Cong. Rec., Vol. 117, Part 30, 39251. 39259 (App. 073, 074, 075, 076); Rep. Mink (App. 073-074).

Section 1681(b) of Title IX (as codified) states as follows:

> Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area . . .

The sponsors of this language stated that it was intended to make "absolutely certain" that quotas would not be used to interpret and enforce Title IX. *Statement of Rep. Quie, App. 075-076.*

Regulations

The Department of Education's preamble to the Title IX regulations states: "[t]he Department's intent ... is to require institutions to take the interests of both sexes into account in determining what sports to offer." *App.83.* The regulations themselves require schools to "provide equal athletic opportunity for members of both sexes" by, among other things, "effectively accommodat[ing] the interests and abilities of members of both sexes." 34 CFR §106.41(c)(1). *App. 070.* The regulations also prohibit different treatment or rules; denial of benefits; or limits on rights or opportunities based on gender. 34 CFR §106.31(b). *App. 069.* The regulations were approved by the President in 1975 and submitted to Congress for review. When Congress did not disapprove of the regulations, they took effect.

Administrative Interpretations

In its 1978 Proposed Policy Interpretation, HEW stated:

> The Title IX regulation does ***not*** require an equal number of men and women participants or an equal number of men's and women's sports. Rather, ***it requires that the interests and abilities of men and women be equally accommodated.***

App. 078 (emphasis added). The final Policy Interpretation states: "[T]he ***governing principle*** ... is that the athletic interests and abilities of male and female students must be ***equally effectively accommodated.***" *App. 079* (emphasis added).

The Policy Interpretation also contains the Three-Part Test, under which schools will be found in compliance with the "equal opportunity" provisions of the regulations if: (1) their athletic programs provide intercollegiate athletic opportunities in substantial proportion to the gender makeup of the student body; (2) the school can show a history and continuing practice of expanding women's athletic programs; or (3) the school's intercollegiate athletic program fully and effectively accommodates the interests of female students. *App. 078-079.*[4]

In 1996 OCR issued its "Clarification of the Three Part Test." *ER 3799-3809.* In that document, OCR stated the following: (1) schools would be found in compliance with Title IX and its regulations if their athletic programs are gender-proportional to enrollment; (2) schools can comply under Part One by eliminating male athletes; and (3) "opportunities" are defined as "actual participants". *App. 080; ER 3793-3797.* Nothing in the Clarification suggests that schools must or should equally accommodate the athletic interests and abilities of both sexes.

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[4] The Policy Interpretation is an administrative interpretation of the regulations, and therefore is not binding on the courts, unlike the regulations themselves. *Batterton v. Francis*, 432 U.S. 416, 425 fn. 9 (1977). Furthermore, the Policy Interpretation was never approved by the President or the Congress, and therefore lacks the binding force of the rules, regulations, and orders authorized by Title IX at 20 U.S.C. §1682. Moreover, since the Policy Interpretation was never submitted to Congress for review and possible disapproval under §431(d) of the General Education Provisions Act, as amended by §509(a)(2) of the General Education Amendments of 1974 (Pub. L. 93-380, 88 Stat. 567), it probably lacks any prescriptive force whatsoever.

REASONS FOR GRANTING THIS PETITION

I. THE COURT OF APPEALS' RULING IS CONTRARY TO THE LANGUAGE OF TITLE IX AND ITS LEGISLATIVE HISTORY.

A. The Ninth Circuit's Holding That CSUB's Elimination Of Male Athletes Is A "Remedial Action" Allowed By Title IX Is Contrary To The Statutory Language.

There was no evidence in the record before the Ninth Circuit that CSUB's athletic program discriminated against females or afforded them less opportunity than males. On the contrary, CSUB *stipulated* that it was aware of no complaints or allegations that females have been treated worse than males, have had less opportunity than males, or have been discriminated against in any way by CSUB's athletic program. Furthermore, it is undisputed that females at CSUB have more varsity athletic teams than males, and comprise significantly more varsity athletes than males, despite the fact that more males express an interest in varsity athletic participation. CSUB's athletic program has actually given females more opportunity and better treatment than males.

Given this record, the only possible rationale for the Ninth Circuit's holding that CSUB's reduction of male athletes was a remedial action is that discrimination against females at CSUB is demonstrated by the mere fact that women constitute a greater percentage of students (64%) than athletes (60%). But the plain language of Title IX precludes a conclusion that a deviation from proportionality alone constitutes discrimination. Section 1681(a) prohibits all gender discrimination at federally funded educational institutions, while §1681(b) states that §1681(a) shall not be interpreted to require gender proportionality. This necessarily means that Title IX *allows* deviation from proportionality, and therefore such a deviation on its own does not constitute discrimination under the statute. If Congress had intended otherwise, it would have drafted Title IX to require steps to ensure proportionality. It did not do so. On the contrary, Congress explicitly stated that a deviation from proportionality did *not* establish discrimination. *See, e.g., Statement of Rep. Mink, App. 073, 074* ("Even if 90 percent of those admitted to science departments were men,

there could be no complaint as long as those women who did apply were considered on an equal basis with men."). *See also, Statements of Sen. Bayh, (App 071-072, 076-077); Rep. Green (App. 073, 074-075, 076).* Furthermore, the author of §1681(b) specifically stated that the provision was intended to *prohibit* quota requirements. *See, Statement of Rep. Quie, App. 075-076.*

In cases under Title VI and Title VII, which contain wording virtually identical to that found in Title IX, the Supreme Court has concluded that a statistical disparity alone does not demonstrate discrimination.[5] *See, e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505-511 (1989) ("inference of discriminatory exclusion" can only be made where there is "a significant statistical disparity" between the "number of qualified minority contractors *willing and able* to perform a particular service and the number of such contractors actually engaged [in that service]") (emphasis added); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 340 & n.20, 375 & n.61 (1977) (["42 U.S.C. §2000e-2(j)] makes clear that Title VII imposes no requirement that a work force mirror the general population" and "does not require an employer to grant preferential treatment to any group in order to rectify an imbalance between the composition of the employer's work force and the makeup of the population at large"); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 651-654, n.5 (1989) (statistical proof of discrimination must be based on a comparison of the composition of the workforce and the pool of *qualified applicants*). In contrast, this Court has stated that awarding opportunities proportional to *interest* in those opportunities is probably *not* discriminatory. *Id.* at 653.[6]

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[5] Congress expressly modelled language in Title IX after Title VII. The corresponding language in the statutes should therefore be interpreted in the same way. *See, Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 808-809 (1988); *Jones v. United States*, 527 U.S. 373, 419 (1999); *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 751-752 (1979).

[6] CSU has argued throughout this case that Title VII standards do not apply in Title IX athletics cases because the latter deal with gender-segregated programs. This argument is a red herring. There is no reason to assume discrimination simply because women are a smaller percentage

CSUB's elimination of male athletes is thus not a "remedial action", because there has been no discrimination to remedy. Moreover, even if there *had* been discrimination against females at CSUB, the caps on the men's teams would not be a remedy, since the caps do not create savings that could be used to increase females' opportunity. CSUB has stipulated that the caps were not motivated by financial considerations; and the record shows that the caps likely cost the school money. *See, App. 80-81, ER 3048-3049, 2927, 3038* The caps are solely an effort to create a 60:40 ratio between female and male athletes.

B. The Ninth Circuit's Ruling Is Contrary To Title IX's Two Central Provisions Which Prohibit: (1) Exclusion Based On Gender; And (2) Quota Requirements.

CSUB has stipulated that it has reduced the number of males on its varsity teams solely to create gender proportionality. This action does not square with §1681(a), which prohibits exclusion based on gender in educational programs. The Court of Appeals' only response to this point is its claim that plaintiffs "conceded at oral argument that their interpretation of §1681(a) is just as contrary to the statute as the interpretation advanced by defendants and OCR." *Neal* at 771. But petitioners did no say or suggest this at oral argument. They said eliminating male athletes could not reasonably be prohibited *if* it was necessary to actually create equal opportunity between the sexes, even if such action was technically inconsistent with the language of §1681(a). *App. 067-068; ER 3449-3465.* For example, it would be contrary to the purpose of Title IX to prohibit a school from phasing out some men's teams and using the savings to begin some women's teams, if the school had no women's teams despite significant interest among female students. However, that scenario is not this case. Here, females have more teams and more opportunity than males; their interests are accommodated more than male interests; and the squad size caps do no create savings that could be used to increase female opportunity.

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of athletes than students -- with no reference to the relative numbers of men and women who want to play -- simply because schools may provide separate teams for females.

The only way §1681(a) can be squared with CSUB's elimination of male athletes is to read an exception into the statute allowing exclusion of one gender in order to create proportionality. But such an interpretation of the statute would be contrary to Congress' clearly-expressed intent that Title IX would *prevent* the use of quotas.

For example, Senator Bayh, the Senate sponsor of the language which became §1681(a), stated that this provision was intended to prohibit quotas (*App. 071*); would "strik[e] down quotas" (*App. 072*); and would "do away with every quota" (*Id.*). Instead of quotas, according to Senator Bayh, Title IX would provide opportunity in a sex-blind way, based on merit.[7] *App. 071*. Similarly, Rep. Edith Green, the House sponsor of the language that became §1681(a), stated:

> I want to make it perfectly clear that in Title [IX] there is no quota. ... If a college has 5,000 men and 3,000 or 4,000 women in it and if we adopt [Title IX], it does not mean that the college has to bring the number of women up to 5,000. If we do that, then we are engaging in discrimination, also. In that case we would be discriminating against men. All I want and all I ask is that if two individuals, a man and a woman, come to a college or a university and they have equal credentials and apply for admission, that they shall be treated as equals -- two individuals without any quota.

Statement of Rep. Green, App.73.

These statements were made during debate on the language that later became §1681(a) -- before the amendment which became §1681(b) had even been introduced. *See, App. 073-074*. In other words, the authors of Title IX said that quotas

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[7] "Senator Bayh's remarks, as those of the sponsor of the language ultimately enacted, are an authoritative guide to the statute's construction." *Neal* v. Board of Trustees, 198 F.3d 763, 766 (9th Cir. 1999), quoting *North Haven Board of Education v. Bell,* 456 U.S. 512, 526-527 (1982) (Since Title IX lacks committee reports discussing its provisions, the remarks of Congressional sponsors and supporters are the "only authoritative indications of Congressional intent" as to Title IX.) *Bell,* 456 U.S. at 526-527.

were *inherently discriminatory* and violated §1681(a).[8] *See, Statements of Sen. Bayh, (App. 071-8, 166-167); Rep. Green (App. 073, 074, 075); Rep. Mink (App. 073-074).*

Congressional sponsors and supporters of §1681(b) also stated that this part of Title IX precluded the use of quotas. Representative Albert Quie, who introduced the language of §1681(b), stated: "[T]his amendment would provide that there shall be no quotas in this sex anti-discrimination title." *App. 163, 164.*[9]

These statements are clear indications that Congress intended Title IX to preclude use of requirements or standards based on gender proportionality. The courts are required to give effect to these statements when interpreting the statute. *See, Chevron U.S.A. v. Natural Resources Defense Council,* 467 U.S. 837, 842-843, n.9. (1984); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council,* 485 U.S. 568, 575 (1988).

C. The Ninth Circuit's Conclusion That Petitioner's Position Makes Surplusage of §1681(b) Is Also Inconsistent With The Statutory Language.

The Court of Appeals states that interpreting Title IX as prohibiting exclusion of males simply to create proportionality would make surplusage of §1681(b). *Neal,* 198 F.3d at 771. This is not correct. The concept of "surplusage" implies that a statutory interpretation would make one provision follow inevitably from another provision, making the former

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[8] There does not appear to be any legislative history supporting OCR's current interpretation of Title IX.

[9] Congress explicitly modelled §1681(b) after Title VII's 42 U.S.C. §2000e-2(j). *App. 17.* And this Court has concluded that congress specifically intended §2000e-2(j) to ban use of quotas. *Watson v. Fort Worth Bank & Trust,* 487 U.S. 977, 992-993 (1988) (plurality opinion) (adoption of legal rules that encourage the use of quotas to avoid expensive litigation would be "contrary to Congress' clearly expressed intent" in 42 U.S.C. section 2000e-2(j) of Title VII); *Wards Cove Packing Co. v. Atonio,* 490 U.S. 642, 650-652 (1989) (Congress "expressly rejected" quotas in drafting Title VII.").

unnecessary. This is not the case under petitioners' proposed reading of Title IX, which does not make §1681(b) follow inevitably from §1681(a). Congress could have intended §1681(a) to prevent exclusion of one sex just to create proportionality, as petitioners contend, and also said that the other sex *must* be given preferential treatment to create proportionality -- in other words, proportionality must be achieved, but only by increasing opportunities for one sex, not by reducing opportunities for the other sex. But Congress did not draft §1681(b) this way. Instead, it provided that preferential treatment should *not* be required in order to attain gender proportionality. Since both the actual language of §1681(b) and a possible alternate would be consistent with petitioners' reading of §1681(a), that reading does not make surplusage of §1681(b).

II. THE NINTH CIRCUIT's RULING IS CONTRARY TO THE TITLE IX REGULATIONS, WHICH ARE BINDING ON THE COURTS.

The preamble to the Title IX regulations states: "[t]he Department's intent ... is to require institutions to take the interests of both sexes into account in determining what sports to offer.". *App. 083*. The regulations themselves state that schools must "provide equal athletic opportunity for members of both sexes" by, among other things, "effectively accommodat[ing] the interests and abilities of members of both sexes." 34 CFR §106.41(c)(1), *App. 070*. And the Policy Interpretation -- the document setting forth the original administrative interpretation of the regulations -- states that the "***governing principle***" of compliance with the regulations' provision related to equal opportunity to participate in athletics is that the interests and abilities of both sexes must be ***equally effectively accommodated***. *Policy Interpretation, App. 079 (emphasis added).*[10]

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[10] The fact that equal opportunity is determined by accommodation of *interest* shows that it is those students who indicate an interest in playing -- not the student body as a whole -- that is the appropriate reference group in determining equal opportunity. The relevant comparison under the regulations is therefore between the opportunities provided for members of each gender, and the gender composition of those students who

Regulations are binding on the courts "unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron, supra*, 467 U.S. at 843-844. Yet the Ninth Circuit panel ignored the regulations. Its ruling allows schools to eliminate male athletes to create proportionality with no regard for the numbers of males and females who express an interest in playing. *Neal at 765-773*. In fact, the panel says male and female student interest in athletic participation "is not at all relevant to the question of whether or not [defendants] violated Title IX." *Memorandum Opinion, App.66*. This conclusion is directly contrary to the Title IX regulations, and should therefore be reviewed by this Court.

The Ninth Circuit contends that accommodating the interests and abilities of both sexes equally would freeze or reduce women's participation in athletics. *Neal*, at 766-772. According to the panel, surveys of student interest would disadvantage women because they would occur "under circumstances where men's athletic teams have a considerable head start." *Id.* at 768, citing *Cohen v. Brown University*, 991 F.2d 888, 900 (1st Cir. 1993). Designing an athletic program based on indications of student interest would, according to the panel, "blunt the exhortation that schools should 'take into account the nationally increasing levels of women's interests and abilities.'" *Id.* at 768, citing *Cohen*, 991 F.2d at 990 (quoting 44 Fed. Reg. at 71,417). This position is riddled with legal, factual, and logical flaws.

First, the position is not logical. There is no reason surveys would not detect changes in student interests over time. That would be a principal purpose of the surveys. Schools frequently change athletic and other programs as a result of changes in expressed interest. There is therefore no reason to believe that a university athletic program would be unresponsive to changes in women's athletic interests and abilities if it relied on student interest surveys. On the contrary, it is quota requirements like the proportionality rule that are *inherently* unresponsive both to *changes* in student interest, and to student interest in the first place.

Second, the position is contrary to the record. The evidence before the Court of Appeals showed that the most rapid increase in female athletic participation took place years

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demonstrate the interest and ability to participate in athletics -- not the gender composition of the entire student body.

before proportionality became the standard of Title IX compliance -- i.e., when the only applicable standard was the "equal accommodation of interest" requirement from the regulations. That standard therefore does not freeze female participation. There was no contrary evidence in the record.

Third, the position is inapposite in this case. Females at CSUB have significantly more athletic opportunity than males at CSUB. In light of this, the panel's exclusive focus on whether consideration of student interest would freeze female participation seems inappropriate. Moreover, allowing the men's teams to keep normal squad sizes would not prevent the women from completely filling their teams, thus increasing female participation.

The panel's position that basing CSUB's athletic program on interest surveys would perpetuate a head start enjoyed by men's programs (*Neal* at 768) is also inapposite in this case. *Women* have had the dominant position in CSUB athletics. They have more teams, and have been a majority of the school's varsity athletes for years. This situation is the norm throughout the CSU system. Under the panel's reasoning, *men* would be disadvantaged by student surveys. Despite this, men still comprise the majority of those indicating a desire to play varsity sports.

Fourth, the Ninth Circuit's position that an interest standard would freeze female participation and undermine the purpose of Title IX is unsupported by the statute. Title IX was not aimed simply at increasing female athletic participation, as the panel suggests. *See, Neal* at 767-769. The purpose of Title IX is to ensure equal opportunity -- not ever-increasing participation by one gender, particularly when that gender already has more opportunity than the other.

Fifth, the position is directly contrary to explicit language in the regulations, their preamble, and the Policy Interpretation -- all of which require schools to consider student interest when designing their athletic programs. In fact, the language quoted by the Ninth Circuit regarding taking into account women's interests and abilities is part of a discussion providing guidance on *determining the athletic interests and abilities of students*. *App.079, 084-085*. This discussion relates to the Policy Interpretation's guidance on determining student interest in accordance with the "governing principle" that "the athletic interests and abilities of male and female students must be equally effectively accommodated." *App. 083*. It is ironic that

the panel quoted this language *(Neal at 768)* in support of an argument that schools should not be required to consider student interest in designing their athletic programs.

The Ninth Circuit's ruling also disregards the Title IX regulations at 34 CFR §106.31(b). *App. 069.* This provision prohibits different treatment or rules; denial of benefits; or limits on rights or opportunities based on gender. CSUB's elimination of male athletes, and its entire squad size program, clearly treats males less favorably than females, denies benefits to males based on gender, and limits their opportunities relative to females' opportunities.

III. THE NINTH CIRCUIT's RULING THAT INFORMATION ON STUDENT ATHLETIC INTEREST IS "NOT AT ALL RELEVANT" IN TITLE IX CASES IS CLEAR ERROR.

Under Federal Rule of Civil Procedure 26(b)(1), "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." The Title IX regulations clearly make information on student athletic interest relevant in Title IX cases like this one. The Ninth Circuit's holding that such discovery was properly denied as "not at all relevant" is an extreme example of ignoring binding law, and was clear error. By denying petitioners discovery on the "governing principle" underlying Title IX's equal opportunity requirement, the Court of Appeals essentially deprived petitioners of equal protection under the Federal Rules of Civil Procedure.

IV. THE NINTH CIRCUIT's RULING IGNORES SUPREME COURT PRECEDENT STATING THAT STATUTES, REGULATIONS, AND ORIGINAL AGENCY INTERPRETATIONS TRUMP CONTRARY ADMINISTRATIVE INTERPRETATIONS.

The Court of Appeals' decision is based on deference to OCR's current standards of Title IX compliance. *See, Neal at 770.* According to those standards: (1) a school automatically complies with Title IX if its varsity athletes are gender proportional to its student body; and (2) male athletes may be eliminated simply to create proportionality. *1996 OCR*

Clarification, App.080. The panel did not hold this interpretation up to the language of the statute, congressional intent, the regulations, or to the original longstanding administrative interpretation of Title IX and the regulations. Instead, the Ninth Circuit simply accepted OCR's current interpretation, thus failing to discharge its duty to scrutinize the interpretation. *See, Zuber v. Allen*, 396 U.S. 168, 193 (1969) ("court may not, however, abdicate its ultimate responsibility to construe the language employed by Congress."); *St. Elizabeth Community Hospital v. Heckler*, 745 F.2d 587, 592 (9th Cir. 1984) (deference "does not mean we abdicate our responsibility to review agency action under the regulations promulgated." ... Courts must "examine the interpretation itself in light of the language of the regulations."); *Livermore v. Heckler*, 743 F.2d 1396, 1404 (9th Cir. 1984) (deference "has never required the court to abdicate its own role in deciding questions of statutory interpretation.")

OCR's current interpretation of Title IX is contrary to the statutory language, congressional intent, the regulations, and to the original and longstanding administrative interpretation. The present interpretation should therefore be rejected under well-established Supreme Court precedent.

A. The Courts Should Reject OCR's Current Interpretation Of Title IX Because That Interpretation Forces Schools To Ignore Student Interest, In Direct Conflict With The Regulations.

Courts should not defer to an administrative interpretation that is contrary to the regulations -- even when the administrative agency is interpreting its own regulations. *See, Stinson v. United States*, 508 U.S. 36, 45 (1993); *Paxton v. Secretary of Health & Human Servs.*, 856 F.2d 1352, 1356 (9th Cir. 1988) ("We will not, however, defer to administrative interpretations when they are 'plainly erroneous or inconsistent with the regulation[s].'")

OCR's Three-Part Test for Title IX compliance, particularly as clarified in 1996, is contrary to the regulations because it effectively forces schools to ignore the generally differing athletic interests of males and females. Compliance under Part One obviously ignores student interest, since it is based on the gender composition of the student body as a whole, instead of

the composition of those students who show an interest in athletic participation. And the other two parts of the Test are not realistic long-term options for schools. To satisfy Part Two, a school must have consistently added women's teams. But a school that continues to adds female teams would eventually attain proportionality and stop adding teams once it attains proportionality (and therefore complies under Part One). Part Two is thus only a temporary waystation on the road to proportionality.

As for Part Three, satisfying this part requires a school to satisfy all athletic interests of females sufficient to form a viable varsity team. (The degree to which *male* athletic interest is met is not considered for purposes of Part Three or any other part.) Schools will rarely even try to satisfy *all* athletic interests of one sex. There will almost always be enough females (and males) at a school who would like, and could form, a team the school does not offer.[11] But it would be unreasonably expensive for schools to provide every team for which there is sufficient interest and a possibility of competition -- for either sex. Part Three is therefore not a practical long-term option.[12] Complying with Part One by attaining proportionality is much more certain, and economical, particularly since OCR now allows schools to create proportionality by eliminating male athletes.

The overall effect of the Three-Part Test is thus to force schools to attain proportionality. This necessarily means that these schools will accommodate the athletic interests of one sex more than the other, since the gender composition of the student body generally does not match the gender composition of the students who want to play a varsity sport. Schools

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[11] The NCAA sanctions 26 women's sports; whereas most schools have less than 10 varsity teams for each sex.

[12] In response to petitioners' subpoena in the District Court, OCR produced all of its approximately 120 Title IX investigations concerning athletic participation. Those records show that only a handful of the schools investigated complied under either Part Two or Part Three.

therefore *must* violate 34 CFR §106.41(c)(1) in order to comply with the Three-Part Test.[13]

B. The Courts Should Reject OCR's Current Interpretation Of Title IX Because: (1) It Requires Schools To Eliminate Male Athletes Because Of Their Gender, In Violation Of Title IX's §1681(a); and (2) It Is For All Practical Purposes A Quota Requirement, In Violation Of §1681(b) And Congressional Intent.

While §1681(a) prohibits exclusion based on gender, OCR's current interpretation of Title IX now explicitly allows it. *1996 OCR Clarification, App. 080.* In fact, since schools can attain proportionality more cheaply by eliminating at least some male athletes rather than by solely adding female teams, OCR's current interpretation *encourages* schools to exclude male athletes. And although §1681(b) prohibits quota requirements, and Congress clearly indicated that it intended Title IX to prohibit quotas, the Three-Part Test is effectively a quota requirement, as discussed above.

The Three-Part Test, particularly per OCR's 1996 Clarification, is thus at odds with the language of Title IX. The courts therefore should *not* defer to the Three-Part Test. *See*, Stinson, 508 U.S. at 44-45; (deference is only owed to an agency interpretation that is "a permissible construction of the statute." "[I]f a statute is unambiguous the statute governs."); *General Electric Co. v. Gilbert*, 429 U.S. 125, 144-145 (1976); *Chevron*, 467 U.S. at 842-843, n.9 (courts "must reject administrative constructions which are contrary to clear congressional intent").

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[13] Plaintiffs are not alone in arguing that OCR's current interpretation of Title IX is contrary to the statute and the regulations. The Secretary of the Department of Health, Education and Welfare (HEW) responsible for issuing the Title IX Regulations has drawn the same conclusion. *See, Amicus Brief of Former HEW Secretary Caspar W. Weinberger, Case No. 96-1321, March 20, 1997.* So have at least two federal judges in addition to Judge Coyle. *See, Pederson v. Louisiana State University*, 912 F.Supp. 892, 911-914 (M.D.La. 1996); *Cohen v. Brown University*, 101 F.3d 155, 188-199 (1st Cir. 1996) (Toruella, dissenting).

C. The Courts Should Reject OCR's Current Interpretation Of Title IX Because It Is Directly Contrary To The Longstanding Original Administrative Interpretation Of The Law And Its Regulations.

OCR's current interpretation is also a 180-degree reversal from the longstanding original administrative interpretation of Title IX and the regulations. For many years after Title IX and its regulations were adopted, OCR and its predecessor (HEW) stated that the statute and regulations required schools to accommodate the athletic interests of males and females equally. Now OCR does not even consider whether the interests of both sexes are equally accommodated, and its Three-Part Test essentially guarantees *unequal* accommodation of interest.

HEW also originally acknowledged that male and female athletic interests might differ at a particular school, and that different athletic participation rates therefore did not necessarily say anything about whether the school was discriminating. For example, HEW stated the following in its 1978 proposed Policy Interpretation:

> Intercollegiate athletic programs that provide equal opportunities for both sexes may offer different sports, and have ***different participation rates*** and varying competition opportunities for men and for women, ***because their interests and abilities may be different***. These differences will result in different men's and women's programs that do not violate Title IX.

App. 078 (emphasis added). OCR's 1980 Title IX Investigator's Manual also explicitly recognized that athletic interests of males and females might differ:

> Differences between men's and women's programs are justifiable ***if they are attributable to demonstrated differences in the interests and abilities of the members of each sex.***

(emphasis added). *App. 088-091.* In marked contrast to the above pronouncements, OCR now presumes that a school is

violating Title IX and 34 CFR §106.41(c)(1) if it is not in proportion. *See, App. 080, 092-099.* OCR also automatically concludes that a school complies with Title IX if it is in proportion -- regardless of how unequally the school accommodates the interests of males and females. *OCR Clarification, App.080*

Courts should not defer to an agency interpretation that is inconsistent with a prior administrative interpretation. *See, General Electric, supra*, 429 U.S. at 144-145 (rejecting administrative interpretation found to be in conflict with earlier agency pronouncements); *INS v. Yang*, 519 U.S. 26, 32 (1996) ("irrational departure" from prior policy could constitute action that must be overturned as "arbitrary, capricious, [or] an abuse of discretion"); *Deukmejian v. U.S. Postal Service*, 734 F.2d 460, 462 (9th Cir. 1984) ("deference due an administrative interpretation of an agency's own regulation depends upon its consistency with earlier agency pronouncements"). It is particularly inappropriate to defer to an agency interpretation that conflicts with that agency's announced position at the time the regulation was adopted. *See, Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994) (no deference is owed to an agency interpretation where a different reading "'is compelled by ... other indications of the [agency's] intent at the time of the regulation's promulgation.'").

D. The Courts Should Reject OCR's Current Interpretation Because It Is Irrational In The Extreme.

Courts should reject administrative interpretations that are arbitrary or capricious. *Chevron*, 467 U.S. at 844; *INS v. Yang*, 519 U.S. 26, 32 (1996). An agency rule is considered arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem." *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 43 (1983). When the agency makes such an omission, a court reviewing the agency's standard "should not attempt itself to make up for such deficiencies", or "supply a reasoned basis for the agency's action that the agency itself has not given." *Id.*, quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). The Three-Part Test, particularly as clarified by OCR in 1996, is arbitrary and capricious both because it

inappropriately redefines key terms, and because it inevitably leads to irrational results.

1. OCR's Application Of The Three-Part Test Employs Distorted Definitions Of The Terms "Opportunity" And "Equal"

Definitions that do not comport with standard meanings of words should not be accepted by the courts. *Amoco Production Company v. Southern Ute Indian Tribe*, 526 U.S. 865, 873 (1999) ("'Unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning' at the time Congress enacted the statute."); *Perrin v. United States*, 444 U.S. 37, 42 (1979) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."). OCR's current interpretation of Title IX, as stated in the 1996 Clarification and reflected in its recent investigations, uses definitions of the key terms "equal" and "opportunity" that do not comport with standard meanings, and should therefore be rejected.

In applying the Three-Part Test, OCR first compares the percentages of male and female athletes to those of male and female students to determine if a school complies with Part One. After reviewing the number of the school's varsity athletes, OCR then states essentially that the number of male athletes equals the number of participation "opportunities" available to males; and the number of female athletes equals the number of participation "opportunities" available to females. These findings erroneously assume that the number of participants is equal to the number of opportunities. This is consistent with the 1996 Clarification's redefinition of the word "opportunity" to mean "actual participants". *App. 080.* It is not, however, consistent with the actual meaning of the word "opportunity".

Under OCR's definition of the word "opportunity", if only 15 females try out for a women's soccer team that is seeking 20 players, then the team offers only 15 "opportunities" for females to play soccer. This definition of "opportunity" is

Orwellian newspeak. The soccer team in this hypothetical provides 20 opportunities for women to play, not 15.[14]

OCR also uses a non-standard definition of the term "equal". In OCR's new language, "equal" means "proportional to the gender makeup of the student body". Combining OCR's definitions of "equal" and "opportunity" leads to results that are both absurd and contrary to the letter and spirit of Title IX and its regulations. For example, assume in the hypothetical mentioned above that the school with the men's and women's soccer teams has a student body of 60% females and 40% males (like CSUB). Assume as before that 20 men go out for the men's team, and 15 women go out for the women's team (leaving 5 empty slots). OCR would say that women do not have "equal opportunity", because there are only 15 "opportunities" for females, while there are 20 opportunities for males. Cutting the males down to 15 would not create "equal opportunity" in OCR newspeak, because the athletes would not be proportional to enrollment.

To satisfy OCR's definition of "equal opportunity", the men's team would have to eliminate 10 players -- so athletic participation (15 female/10 male) would match the school's student body (60% female/40% male). Under this state of "equal opportunity", *all* the women who want to play can do so, but only *half* the men who want to play can do so. OCR would describe the exclusion of the 10 male athletes as "providing equal opportunity for women", or "remedying discrimination" against women, even though cutting the 10 men violated of 20 U.S.C. §1681(a) and 34 CFR §106.41(c)(1) -- and did nothing for the women.[15] This

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[14] OCR's Letters of Finding are replete with examples of women's teams that have many unfilled slots that are not counted as opportunities. In some cases, OCR compares the number of female athletes at a school in different years, notes that the number of participants has declined, and concludes that the school is offering fewer "opportunities" for women -- even though the only change is that fewer women went out for the same exact teams. In some instances, simply having the women fill their teams would create proportionality.

[15] The recent report of the Secretary of Education's Commission on Opportunity in Athletics concludes that "[a]rtificial limits on walk-on opportunities do not benefit anyone." *App. 082.*

outrageous hypothetical is *exactly* how OCR currently interprets and enforces Title IX, and it is *exactly* what this case is about.

2. OCR's Three-Part Test Leads To Irrational Results.

The record on appeal below included relevant excerpts from all of OCR's Title IX investigations concerning athletic participation. Those investigations show how OCR's new definition of "equal opportunity", applied through its Three-Part Test, leads to patently irrational results. One particularly clear example was OCR's 1995 investigation of Wichita State University. Wichita State had a student body of about 50% males and 50% females, and offered the same seven sports for both males and females – plus the additional sport of volleyball for females. It is difficult to see how this program did not provide at least equal opportunity for females. However, more males went out for the men's teams, so the actual athletic participants were almost 60% male even though the women had the additional team. *ER 2185-2197.*[16]

OCR applied its Three-Part Test and determined that females were a lower percentage of athletes than students (Part One); the school last added a women's team in 1983 (Part Two); and there was interest in additional women's varsity teams (Part Three). It thus concluded that no part of the Three-Part Test was met, and that females therefore were denied equal opportunity. OCR directed Wichita State to reduce the number of male athletes by fifteen. *App.100, 111.* This directive to eliminate male athletes was OCR's response to a situation where females already had more athletic opportunity than males -- as in this case.

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16 The disparity in athletic participation at Wichita State was not due to fewer scholarships for women. On the contrary, OCR found that Wichita State's provision of athletic scholarships was so disproportionate in favor of females that the school violated Title IX's scholarship requirements. Nevertheless, OCR directed the school to significantly *increase* women's scholarships in an effort to move toward proportionality. *App. 109; ER__.*

V. THE NINTH CIRCUIT's DECISION IS CONTRARY TO SUPREME COURT PRECEDENT UNDER THE EQUAL PROTECTION CLAUSE.

State action which denies rights or opportunities to one gender is subject to "skeptical scrutiny" and is allowed only when: (1) an "exceedingly persuasive justification" for the gender classification exists; and (2) the gender classification is substantially related to an important government objective. *United States v. Virginia*, 518 U.S. 515, 531-533 (1996). The standards used to scrutinize gender classifications are the same regardless of which gender is harmed. *Mississippi University for Women v. Hogan*, 458 U.S. 718, 723 (1982) ("That this statutory policy discriminates against males ... does not exempt it from scrutiny or reduce the standard of review"); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975).

The Court of Appeals concluded that OCR's proportionality standard was "substantially related to an important government interest [of preventing sex discrimination]." *Neal,* 198 F.3d at 772, citing *Cohen v. Brown University* and *Kelly v. Board of Trustees*. This argument simply assumes that a deviation from proportionality constitutes discrimination. That assumption is wrong. Statistical disparities alone do not establish discrimination, under either Title IX (see above), or the Equal Protection Clause. *Mayor of Philadelphia v. Educational Equity League*, 415 U.S. 605, 620-621 (1974) (finding "simplistic percentage comparisons" not meaningful in determining existence of alleged discrimination); *Croson, supra*, 488 U.S. at 507-508 (assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population found to be "completely unrealistic"); *Milliken v. Bradley*, 418 U.S. 717, 740-41 (1974) (no constitutional right to a specific racial balance in schools); *Washington v. Davis*, 426 U.S. 229, 244-246 (1976).

Since females at CSUB have not themselves been discriminated against, they are not entitled to preferential treatment because of their gender. A governmental entity may invoke a compensatory purpose to justify a discriminatory classification only if members of the gender benefitted by the classification actually suffer a disadvantage related to the classification. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648

(1975); *Mississippi University for Women v. Hogan*, 458 U.S. 718, 728 (1982) (general assertions of societal discrimination are insufficient to satisfy burden of justifying gender-based preference, absent some indication that the "members of the gender benefitted by the classification actually suffer[ed] a disadvantage related to the classification."); *Coral Construction Co. v. King County*, 941 F.2d 910, 931-932 (1991).

VI. THIS CASE IMPLICATES IMPORTANT ISSUES WITH WIDESPREAD AFFECTS.

The widespread practice of eliminating male walk-on athletes to attain gender proportionality affects tens of thousands of student-athletes in colleges throughout the country. Individuals denied the opportunity to participate in college athletics lose opportunities that could have profound positive affects on the rest of their lives. This case also implicates fundamental notions of fairness and equality. In addition, the transformation of Title IX into a form that departs so radically from the statutory language, congressional intent, and original administrative interpretation raises important questions about the limits of the power of administrative agencies and courts to reshape laws adopted by elected officials pursuant to the procedures of our Constitution.

VII. THIS COURT SHOULD NOT DECLINE REVIEW OF THIS CASE BECAUSE THERE IS NO CONFLICT IN THE CIRCUITS.

Petitioners are aware that the courts of appeal that have considered Title IX athletics cases have upheld proportionality as a standard of Title IX compliance.[17] However, petitioners have also shown that these rulings have improperly elevated a non-binding administrative interpretation over binding language in the statute, regulations, and Supreme Court precedent. The circuits have essentially just followed each other like railway cars on a train that has run off its tracks, with

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[17] In addition to the District Court's initial rulings in this case, at least one other federal court has rejected proportionality as a standard of compliance under Title IX. *See, Pederson v. Louisiana State University*, 912 F.Supp. 892, 911-913 (M.D.La. 1996).

the *Cohen v. Brown* opinions as the locomotive. The momentum of this wayward train is probably too strong to reverse itself, and in any event, there are few circuits that have not already followed the lead of *Cohen, et al.* This Court should not delay stepping in to correct the distortion of Title IX that is essentially requiring higher educational institutions in this country to discriminate based on gender.

VIII. THE RECORD IN THIS CASE PRESENTS THE KEY ISSUES WITH EXCEPTIONAL CLARITY.

The record in this case is fully developed -- comprising over 4400 pages. Included in the record are the relevant portions of all OCR investigations concerning intercollegiate athletic participation. Those documents shed much light on how OCR's current interpretation of Title IX actually works, and belies much of the public misinformation on Title IX issues. The record also presents the essential issues in the most distilled form possible, because the evidence leaves no doubt that the only reason CSUB has eliminated male athletes is to satisfy a gender ratio requirement. The caps on the men's teams do not redress prior discrimination; and they do not increase opportunities for females. They simply exclude males because of their gender. It is time for the Supreme Court to examine what has happened to a very good law.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for certiorari.

Dated: April 14, 2003

Respectfully submitted,

MARK MARTEL

Mark Martel
Attorney for Petitioners
Stephen Neal, *et al.*

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

NEAL vs. BOARD OF TRUSTEES
No. CV-F-97-5009 REC

ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

On March 16, 1998, the court heard plaintiffs' Motion for Preliminary Injunction. Upon due consideration of the written and oral arguments of the parties and the record herein, the court grants this motion for the reasons set forth herein. In an action commenced on January 10, 1997, plaintiffs, individual male and female and/or Hispanic members of the California State University, Bakersfield (CSUB) varsity wrestling team, Friends of Bakersfield Wrestling, a group of local supporters of the CSUB wrestling team. Kern County Wrestling Association, an organization representing several hundred high school wrestlers in Kern County, and National Wrestling Coaches Association, sued the Board of Trustees of the California State University, CSUB, Barry Munitz, Chancellor of the California State University, Tomas Arciniega, President of CSUB, and Randy Carvajal, Athletic Director of CSUB. The First Amended Complaint filed on February 2, 1998 alleges that defendants plan to eliminate wrestling at CSUB solely to reduce the number of male athletes at CSUB, to reduce the spending on male athletes at CSUB, and to exclude males from participation in intercollegiate activities in violation of 20 U.S.C. § 1681 (Title XI), Title VII, 42 U.S.C. § 1983, the Fourteenth Amendment, 45 C.F.R. § 86.41(c), and 34 C.F.R. § 1061.41 (c).1 In pertinent part, the First Amended Complaint alleges that the ^Policy Interpretation" published by the Office for Civil Rights of the United States Department of Education on December 11, 1979, 44 Fed.Reg. 71413 et sea. (1979), also known as the

1. The First Amended Complaint was filed in response to the court's Order Granting in Part and Denying in Part Defendants' Motion to Dismiss filed on December 26, 1997 (hereinafter referred to as the December 26 Order). Plaintiffs' Motion for Temporary Restraining Order, which motion led to the Motion

for Preliminary Injunction set to be heard on March 16, was filed while the Motion to Dismiss was still under submission.

"Three-Part Test", is inconsistent with the requirements of the regulations implementing Title IX set forth at 34 C.F.R. § 106 and violates Title IX. The First Amended Complaint alleges that the Section 3 of the Consent Decree, see infra, is modeled after the allegedly illegal "Policy Interpretation" and that defendants "knew or should have known at the time they approved Section 3 of the Consent Decree that the section violated, and would require continued violation of, the rights of athletes at California State Universities to equal athletic opportunities for both sexes and effective accommodation of the athletic interests and abilities of members of both sexes. The First Amended Complaint alleges that, "[o]n March 8, 1996, the CSUB Intercollegiate Athletics Advisory Committee announced its plan to eliminate the wrestling program in order to satisfy the requirements of the Consent Decree." Count 1 of the First Amended Complaint, captioned "sex discrimination" in violation of 20 U.S.C. § 1681, alleges in pertinent part:

58. 20 U.S.C. § 1681 (Title IX) prohibits exclusion from participation in educational programs or activities on the basis of sex. The regulations adopted pursuant to Title IX require universities that receive federal funds to provide equal opportunities for both sexes to participate in intercollegiate athletics and to effectively accommodate the athletic interests and abilities of both sexes.

59. The purpose and effect of defendants' plan to eliminate wrestling at CSUB is to reduce the number of male athletes at the university. Defendants' plan will exclude plaintiffs male wrestlers from participation in athletics on the basis of their sex, in violation of Title IX ....

60. By eliminating male wrestling at CSUB, defendants will fail to effectively accommodate the interests and abilities of both male and female wrestlers, in violation of the regulations adopted pursuant to Title IX.2 On September 22, 1997, plaintiffs filed an Application for Temporary Restraining Order seeking to preclude defendants from implementing a directive to the CSUB wrestling team from CSUB Athletic Director Carvajal requiring that the wrestling team reduce the number of

its members to 34, with no more than 25 of those members to be male. The court granted a temporary restraining order, temporarily enjoining defendants from implementing a directive to the CSUB wrestling team from the CSUB Athletic Director requiring that the wrestling team reduce the number of its members to 34, with no more than 25 of those members to be male.3 The court also scheduled a hearing on plaintiffs' Motion for Preliminary Injunction.

2. The First Amended Complaint contains many more factual and legal allegations but these are the ones relevant to an alleged violation of Title IX. The court notes that CSUB Intercollegiate Athletics Advisory Committee (IAAC) is not a named defendant. Defendants represent in their opposition brief that the IAAC is a body of campus and community leaders formally charged with studying and evaluating the CSUB athletic program and making any recommendations or suggestions deemed pertinent. According to defendants, the IAAC meets at least once a quarter.

3. The seven men who were temporarily reinstated to the wrestling team because of the court's order are all walk-ons, i.e., they were not recruited or subject to scholarship.

In seeking a preliminary injunction, plaintiffs contend that the reason for capping the size of CSUB's wrestling team is to reduce the number of male athletes at CSUB in order to satisfy gender ratio requirements, an action and purpose which plaintiffs assert amounts to gender-based exclusion in violation of Title IX.

A. Governing Standard.

"The purpose of the preliminary injunction is to preserve the status quo between the parties pending a final determination of the merits of the action." 7-Pt. 2 Moore's Federal Practice, 5 65.04[1] at 65-30. "'The status quo is that last uncontested status which preceded the pending controversy.'" Tanner Motor Livery, Ltd. v Avis, Inc., 316 F.2d 804, 809 (9th Cir.), cert. Denied, 375 U.S. 821 (1963). The standards governing the issuance of a preliminary injunction in the Ninth Circuit are reiterated in Martin v. International Olympic Committee, 740 F.2d 670, 674-675 (9th Cir. 1984):

In this circuit, a party seeking preliminary injunctive relief must meet one of two tests. Under the first, a court may issue a preliminary injunction if it finds that: (1) the [moving party] will Suffer irreparable injury if injunctive relief is not granted, (2) the [moving party] will probably prevail on the merits, (3) in balancing the equities, the [non-moving party] will not be harmed more than [the moving party] is helped by the injunction, and (4) granting the injunction is in the public interest.

Alternatively, a court may issue a preliminary injunction if the moving party demonstrates 'either the possibility of irreparable injury or that serious questions are raised and the balance of the hardships tips sharply in his favor.'

Under this last part of the alternative test, even if the balance of the hardships tips decidedly in favor of the moving party, it must be shown as an irreducible minimum that there is a fair chance of success on the merits.

"The Ninth Circuit has concluded, however, that these two tests are "not really two entirely separate tests, but that they are merely extremes of a single continuum." Benda v. Grand Lodge of IAM, 584 F.2d 308, 315 (9th Cir. 1978), cert. dismissed, 441 U.S. 937 (1979). Because the difference between the two formulations is insignificant, the Ninth Circuit accepts either as satisfactory. Benda, id.
However, at no point in the continuum is the court "bound to decide doubtful or difficult questions of law or disputed issues of fact." Dymo Industries, Inc. v. Tapeprinter, Inc., 326 F.2d 141, 143 (9th Cir. 1965).

1. Likelihood of Success on the Merits.

The court concludes from the evidence before it that plaintiffs have demonstrated a likelihood of success on the merits of their claim that the capping of the size of the male athletic teams at CSUB violates Title IX. The court is persuaded that plaintiffs have demonstrated that primary purpose for the capping of the men's athletic teams is gender-based in order to meet gender proportionality requirements. As this court implies in the December 26 Order rejecting defendants' argument that the first

part of the Three-Part Test should be construed as a "safe harbor", 4 an effort to obtain proportionality is not a shield against liability under Title IX. Although all the court did by its ruling in the December 26 Order was deny a motion to dismiss based on a certain construction of the first prong of the Three-Part Test, the court concludes that relying on proportionality to cap the men's athletic teams at CSUB in order to comply with the Consent Decree constitutes implementation of a quota based on gender in violation of Title IX.

2. Irreparable Injury.

Because plaintiffs have demonstrated a likelihood of success on the merits that the capping of the men's athletic teams at CSUB described above constitutes discrimination on the basis of sex in violation of Title IX, plaintiffs have also demonstrated the possibility of irreparable injury in the absence of a preliminary injunction. See Associated Gen. Contractors of Cal. v. Coalition, 950 F.2d 1401, 1412 (9th Cir. 1991). Moreover, as the court previously concluded when it issued the temporary restraining order, plaintiffs

4. At page 33 of their opposition to plaintiffs' Motion for Preliminary Injunction, defendants assert that the court should reconsider this portion of its December 26 Order. The court declines to do so, the court remaining persuaded that of the validity of its conclusion. Moreover, defendants" request is not properly before the court.

have demonstrated irreparable injury in the absence of a preliminary injunction because the loss of training and competition will effectively end the collegiate career of those athletes cut from the team because of the capping requirement and because of the loss of sparring partners.

3. Public Interest.

The court also concludes that the public interest weighs in favor of granting a preliminary injunction because of the likelihood of success on the merits of plaintiffs' claim that the capping of the men's athletic teams itself violates Title IX

because it has the effect of implementing discrimination on the basis of sex.

ACCORDINGLY, IT IS ORDERED that plaintiffs' Motion for Preliminary Injunction is granted.

IT IS FURTHER ORDERED that defendants are enjoined from implementing the cap on the number of males on the CSUB wrestling team pending further order of this court. IT IS FURTHER ORDERED that plaintiffs shall post a bond in the amount of $50,000.00 for payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

Dated: Feb 22, 1999

ROBERT E. COYLE
UNITED STATES DISTRICT JUDGE

Neal v. Board of Trustees of California State Universities
198 F.3d 763, 140 Ed. Law Rep. 533, 1999 Daily Journal D.A.R. 12,585
C.A.9 (Cal.),1999.

*764 Peter W. Davis, Crosby, Heafey, Roach & May, San Francisco, California, for the defendants-appellants.
Mark Martel, Palo Alto, California, for the plaintiffs-appellees.
Josephine R. Potuto, University of Nebraska College of Law, Lincoln, Nebraska, for the amici.
Appeal from the United States District Court for the Eastern District of California; Robert E. Coyle, Chief District Judge, Presiding. D.C. No. CV- 97-05009-REC.

*765 CYNTHIA HOLCOMB HALL, Circuit Judge:
The instant case requires us to consider whether Title IX prevents a university in which male students occupy a disproportionately high percentage of athletic roster spots from making gender-conscious decisions to reduce the proportion of roster spots assigned to men. We hold that Title IX does not bar such remedial actions.

The Board of Trustees of the California State Universities and other defendants appeal from the district court's order granting the motion of Neal and other plaintiffs for a preliminary injunction. Neal's suit alleged that the decision of California State University, Bakersfield ("CSUB") to reduce the number of spots on its men's wrestling team, undertaken as part of a university-wide program to achieve "substantial proportionality" between each gender's participation in varsity sports and its composition in the campus's student body, violated Title IX and the Equal Protection Clause of the United States Constitution. The district court determined that regulations promulgated pursuant to Title IX, and CSUB's program, which was modeled after those regulations, violated Title IX. The district court declined to reach the merits of the constitutional challenge, but did hold that the regulations interpreting Title IX "raised serious constitutional questions" and rejected Plaintiffs' construction of Title IX on that alternative ground. This Court has jurisdiction to review the district court's granting of a preliminary injunction under 28 U.S.C. § 1292(a)(1). We reverse, and vacate the injunction.

I.

Defendant/Appellant CSUB is a large public university where female students outnumbered male students by roughly 64% to 36% in 1996. The composition of CSUB's varsity athletic rosters, however, was quite different. In the 1992-93 academic year, male students took 61% of the university's spots on athletic rosters and received 68% of CSUB's available athletic scholarship money.

This imbalance helped prompt a lawsuit by the California chapter of the National Organization for Women, alleging that the California State University system was violating a state law that is similar to the federal government's Title IX. That lawsuit eventually settled, resulting in a consent decree mandating, inter alia, that each Cal State campus have a proportion of female athletes that was within five percentage points of the proportion of female undergraduate students at that school. This portion of the consent decree was patterned after the first part of the three-part Title IX compliance test promulgated by the Department of Education's Office for Civil Rights ("OCR").

When the university agreed to the consent decree, California was slowly emerging from a recession, and state funding for higher education was declining. As a result, CSUB administrators were seriously constrained in what they could spend on athletic programs. The university chose to adopt squad size targets, which would encourage the expansion of the women's teams while limiting the size of the men's teams. In order to comply with the consent decree, CSUB opted for smaller men's teams across the board, rejecting the alternative of eliminating some men's teams entirely. CSUB's plan was designed to bring it into compliance with the consent decree by the 1997-98 academic year, meaning that female students would fill at least 55% of the spaces on the school's athletic teams. [FN1]

FN1. This figure assumed 60% female enrollment for that year.

As part of this across-the-board reduction in the number of slots available to men's athletic teams, the size of the men's wrestling team was capped at 27. Although the reduction was protested vigorously by wrestling coach Terry Kerr, and team captain Stephen Neal expressed concerns *766 that a smaller squad would prove less competitive, the smaller CSUB team performed exceptionally well, winning the Pac-10 Conference title and finishing third in the nation in 1996. In 1996-97, the men's wrestling roster was capped at 25, and four of these spots went unused. Nevertheless, in response to the rumored elimination of the men's wrestling team, on January 10, 1997, the team filed the instant lawsuit, alleging that the university's policy capping the size of the men's team constituted discrimination on the basis of gender in violation of Title IX and the Equal Protection Clause of the Federal Constitution.
The team sought declaratory and injunctive relief to prevent the squad size reductions. CSUB responded by filing a motion to dismiss. The district court initially granted a temporary restraining order preventing the reductions, then granted a preliminary injunction to prevent CSUB from reducing the size of the wrestling team. The district court concluded as a matter of fact that CSUB's primary motivation for capping the size of the men's teams was to meet the gender proportionality requirements in the consent decree. The district court concluded as a matter of law that capping the male teams in

order to comply with the consent decree violated Title IX. Although the district court refused to rule on Plaintiffs' equal protection challenge to the CSUB policy, the court did reject a reading of Title IX that created a "safe harbor" for any school that achieved substantial proportionality between the percentage of athletes of one gender and the percentage of students of that same gender. The court concluded that such an approach would raise serious questions under the Equal Protection Clause, and that a desire to avoid reaching such questions, in and of itself, constituted "ample reason for rejecting the safe harbor idea as part of Title IX."

II.

[1] [2] On appeal, this Court reviews the district court's grant of a preliminary injunction for abuse of discretion, and "that discretion is abused where the district court based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." Roe v. Anderson, 134 F.3d 1400, 1402 (9th Cir.1998) (citation and internal quotation marks omitted), aff'd sub nom. Saenz v. Roe, 526 U.S. 489, 119 S.Ct. 1518, 143 L.Ed.2d 689 (1999). The district court's interpretation of Title IX is reviewed de novo. See Bay Area Addiction Research & Treatment, Inc. v. City of Antioch, 179 F.3d 725, 730 (9th Cir.1999).

III.

This case has its origins in Congress's passage of Title IX in 1972. Title IX was Congress's response to significant concerns about discrimination against women in education. See North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 523-524 & n. 13, 102 S.Ct. 1912, 72 L.Ed.2d 299 (1982). In the words of the legislation's primary sponsor, Senator Birch Bayh, Title IX was enacted to "provide for the women of America something that is rightfully theirs--an equal chance to attend the schools of their choice, to develop the skills they want, and to apply those skills with the knowledge that they will have a fair chance to secure the jobs of their choice with equal pay for equal work." 118 Cong. Rec. 5808 (1972); see also Bell, 456 U.S. at 526-27, 102 S.Ct. 1912 ("Senator Bayh's remarks, as those of the sponsor of the language ultimately enacted, are an authoritative guide to the statute's construction.... And, because §§ 901 and 902 originated as a floor amendment ...

Senator Bayh's statements--which were made on the same day the amendment was passed ... are the only authoritative indications of congressional intent regarding the scope of §§ 901 and 902.").

The regulations promulgated pursuant to Title IX require schools receiving federal funding to "provide equal athletic opportunity for members of both sexes". *767 34 C.F.R. § 106.41(c). In evaluating schools' compliance with that provision, one factor that will be considered is "whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes". Id. at § 106.41(c)(1). At the same time, "it would require blinders to ignore that the motivation for promulgation of the regulation on athletics was the historic emphasis on boys' athletic programs to the exclusion of girls' athletic programs in ... colleges." Williams v. School Dist. of Bethlehem, 998 F.2d 168, 175 (3d Cir.1993). The drafters of these regulations recognized a situation that Congress well understood: Male athletes had been given an enormous head start in the race against their female counterparts for athletic resources, and Title IX would prompt universities to level the proverbial playing field.

[3] Appellees recognize that, given this backdrop, it would be imprudent to argue that Title IX prohibits the use of all gender-conscious remedies. Appellees therefore suggest that gender-conscious remedies are appropriate only when necessary to ensure that schools provide opportunities to males and females in proportion to their relative levels of interest in sports participation. By contrast, Appellants contend that schools may make gender- conscious decisions about sports-funding levels to correct for an imbalance between the composition of the undergraduate student body and the composition of the undergraduate student athletic participants pool. This disagreement has real significance: Men's expressed interest in participating in varsity sports is apparently higher than women's at the present time--although the "interest gap" continues to narrow--so permitting gender-conscious remedies until the proportions of students and athletes are roughly proportional gives universities more remedial freedom than permitting remedies only until expressed interest and varsity roster spots correspond.

Appellees' argument that equal opportunity is achieved when each gender's athletic participation roughly matches its interest in participating is hardly novel. Several courts of appeals have considered and rejected Appellees' approach as fundamentally inconsistent with the purpose of Title IX. Cohen v. Brown University, 991 F.2d 888 (1st Cir.1993) ("Cohen I "), [FN2] was the first case to rule on the issues raised in the instant appeal. In Cohen I, female members of Brown's volleyball and gymnastics teams brought suit under Title IX after the university eliminated their teams. Women comprised 48% of the school's student body, but less than 37% of the athletes on campus. See id. at 892.

FN2. The First Circuit numbers the Cohen decisions differently. Because we discuss only two opinions, we refer to them as Cohen I and Cohen II.

The Cohen I court interpreted Title IX's requirements in light of the three-part test set forth in the Policy Interpretation promulgated by the Department of Health, Education, and Welfare in 1979. [FN3] That test is used to assess whether a school's athletic program is in compliance with Title IX. A university's athletics program is Title IX-compliant if it satisfies one of the following conditions:

FN3. The OCR later was authorized by Congress to issue Title IX's regulations with respect to athletic opportunities. See Pub.L. No. 93- 380, 88 Stat. 612 (1974).

(1) ... [I]ntercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, ... the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or *768 (3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, ... it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the

present program. 44 Fed.Reg. 71,418 (1979). Appellees attack only the first part of this test, which declares a university Title IX-compliant if participation levels for each gender are "substantially proportionate" to their representation in the student body.

The Cohen I court explicitly rejected Brown's argument that, because male athletes were more interested in athletics, the school could bring itself into Title IX compliance by providing females with fewer athletic roster spots "as long as the school's response is in direct proportion to the comparative levels of interest." Cohen I, 991 F.2d at 899. In Cohen II, the rejection of Brown's argument was even more emphatic: "Brown's relative interests approach cannot withstand scrutiny on either legal or policy grounds, because it disadvantages women and undermines the remedial purposes of Title IX by limiting required program expansion for the underrepresented sex to the status quo level of relative interests." Cohen v. Brown Univ., 101 F.3d 155, 174 (1st Cir.1996) ("Cohen II ") (citations and internal quotations marks omitted).

Under Cohen I, if a university wanted to comply with the first part of the three-part test, it had to provide "athletics opportunities in proportion to the gender composition of the student body," not in proportion to the expressed interests of men and women. Id. 101 F.3d at 176; see also Favia v. Indiana Univ. of Penn., 7 F.3d 332, 343 (3d Cir.1993) (observing that a university whose student body was 56% female, but whose athletic teams were 43% female, would "appear not to be in Title IX compliance"). The reason for Cohen I 's rejection of Brown's/Appellees' "interest" test was clear enough: "Given that the survey of interests and abilities would begin under circumstances where men's athletic teams have a considerable head start, such a rule would almost certainly blunt the exhortation that schools should 'take into account the nationally increasing levels of women's interests and abilities' and avoid 'disadvantag[ing] members of an underrepresented sex....' " 991 F.2d at 900 (quoting 44 Fed.Reg. at 71,417). In other words, Appellees' interpretation of Title IX would have allowed universities to do little or nothing to equalize men's and women's opportunities if they could point to data showing that women were less interested in sports. But a central aspect of Title IX's purpose was to

encourage women to participate in sports: The increased number of roster spots and scholarships reserved for women would gradually increase demand among women for those roster spots and scholarships. [FN4] As the First Circuit held in Cohen II, "[t]o assert that Title IX permits institutions to provide fewer athletics participation opportunities for women than for men, based upon the premise that women are less interested in sports than are men, is (among other things) to ignore the fact that Title IX was enacted in order to remedy discrimination that results from stereotyped notions of *769 women's interests and abilities." Cohen II, 101 F.3d at 178-79; cf. Horner v. Kentucky High Sch. Athletic Ass'n, 43 F.3d 265, 272 (6th Cir.1994) ("Moreover, while reliance on the interest of the member schools in adding a sanctioned sport may appear to be gender- neutral, it is a method which has great potential for perpetuating gender-based discrimination. Under the district court's reasoning, a school system's compliance with Title IX can be measured by the personal views of administrators of individual schools, irrespective of whether these views achieve Title IX's equal opportunity requirement.").

FN4. That is, the creation of additional athletic spots for women would prompt universities to recruit more female athletes, in the long run shifting women's demand curve for sports participation. As more women participated, social norms discouraging women's participation in sports presumably would be further eroded, prompting additional increases in women's participation levels. Cf. Note, Cheering on Women and Girls in Sports: Using Title IX to Fight Gender Role Oppression, 110 Harv. L.Rev. 1627, 1640 (1997) ("In effect, the 'substantially proportionate' approach recognizes that women's attitudes toward sports are socially constructed and have been limited by discrimination and gender stereotypes. Congress passed Title IX to combat such discrimination and stereotypes, thereby changing the social environment in which girls and women develop, or do not develop, interests in sports.").

Appellees and the district court relied heavily on a lone district court opinion, Pederson v. Louisiana State Univ., 912 F.Supp. 892 (M.D.La.1996), which criticized the Policy Interpretation test's first part. However, this criticism is

entirely dicta: The court still found Louisiana State University ("LSU") to be in violation of Title IX and ordered it to bring itself into Title IX compliance immediately, hinting that it should do so by funding women's soccer and softball teams. See id. at 922. The court never addressed the issue of whether LSU could bring itself into Title IX compliance by cutting the opportunities available to male athletes because the parties there never suggested such an approach. Moreover, the Pederson court misunderstood the reasoning behind Cohen, Roberts, and Horner. The Pederson court held that these circuit court opinions relied upon an erroneous assumption that men and women were equally interested in playing sports. See id. 912 F.Supp. at 913-14. As is explained above, those courts emphasized that women's interest in sports appeared to be lower than men's, but that the genders' interests were slowly but surely converging, which was precisely the reason why requiring only that each gender's expressed interest in participating be accommodated equally would freeze the inequality of the status quo.

Title IX is a dynamic statute, not a static one. It envisions continuing progress toward the goal of equal opportunity for all athletes and recognizes that, where society has conditioned women to expect less than their fair share of the athletic opportunities, women's interest in participating in sports will not rise to a par with men's overnight. The percentage of college athletes who are women rose from 15% in 1972 to 37% in 1998, and Title IX is at least partially responsible for this trend of increased participation by women. See Trudy Saunders Bredthauer, Twenty-Five Years Under Title IX: Have We Made Progress?, 31 Creighton L.Rev. 1107, 1107 (1998). Title IX has altered women's preferences, making them more interested in sports, and more likely to become student athletes. See Note, Cheering on Women and Girls in Sports: Using Title IX to Fight Gender Role Oppression, 110 Harv. L.Rev. 1627, 1640-41 (1997). Adopting Appellees' interest-based test for Title IX compliance would hinder, and quite possibly reverse, the steady increases in women's participation and interest in sports that have followed Title IX's enactment. [FN5]

FN5. We also view as instructive this Court's precedent in Jeldness v. Pearce, 30 F.3d 1220 (9th Cir.1994). That case involved a Title IX suit brought by female prisoners that

challenged the lack of vocational educational programs in women's facilities relative to those available in men's facilities. Although the regulations at issue in

Jeldness are different from those at issue here, the prison context is somewhat analogous because, as with college athletic teams, "sex segregation is the accepted norm" in prisons. Id. at 1228. In Jeldness, we rejected the view that differing interest levels among the genders would justify providing women with significantly fewer educational opportunities than men. See id. at 1229.

[4] A number of courts of appeals have addressed another potentially dispositive issue in this appeal--namely, whether Title IX permits a university to diminish athletic opportunities available to men so as to bring them into line with the lower athletic opportunities available to women. Every *770 court, in construing the Policy Interpretation and the text of Title IX, has held that a university may bring itself into Title IX compliance by increasing athletic opportunities for the underrepresented gender (women in this case) or by decreasing athletic opportunities for the overrepresented gender (men in this case). See Horner, 43 F.3d at 275; Kelley v. Board of Trustees, 35 F.3d 265, 269 (7th Cir.1994); Roberts v. Colorado State Bd. of Agric., 998 F.2d 824, 830 (10th Cir.1993) ("We recognize that in times of economic hardship, few schools will be able to satisfy Title IX's effective accommodation requirement by continuing to expand their women's athletics programs.... Financially strapped institutions may still comply with Title IX by cutting athletic programs such that men's and women's athletic participation rates become substantially proportionate to their representation in the undergraduate population."); Cohen I, 991 F.2d at 898 n. 15 ("Title IX does not require that a school pour ever-increasing sums into its athletic establishment. If a university prefers to take another route, it can also bring itself into compliance with the first benchmark of the accommodation test by subtraction and downgrading, that is, by reducing opportunities for the overrepresented gender while keeping opportunities stable for the underrepresented gender (or reducing them to a much lesser extent)."). An extensive survey of Title IX's legislative history and the regulations promulgated to apply its provisions to college athletics concluded that boosters of male sports argued

vociferously before Congress that the proposed regulations would require schools to shift resources from men's programs to women's programs, but that Congress nevertheless sided "with women's advocates" by deciding not to repeal the HEW's athletics-related Title IX regulations. Mary Jo Festle, Playing Nice: Politics and Apologies in Women's Sports 171-76 (1996). Congress thus appears to have believed that Title IX would result in funding reductions to male athletic programs. If a university wishes to comply with Title IX by leveling down programs instead of ratcheting them up, as Appellant has done here, Title IX is not offended.

[5] [6] There is a second reason why a reversal of the district court's order granting injunctive relief on the Title IX claim is warranted. The district court failed to defer properly to the interpretation of Title IX put forward by the administrative agency that is explicitly authorized to enforce its provisions. It is well-established that the federal courts are to defer substantially to an agency's interpretation of its own regulations. See Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 150, 111 S.Ct. 1171, 113 L.Ed.2d 117 (1991). The Department of Education, "acting through its OCR [is] the administrative agency charged with administering Title IX." Cohen I, 991 F.2d at 895. In this instance, Congress explicitly delegated to the agency the task of prescribing standards for athletic programs under Title IX. See Pub.L. No. 93-380, § 844, 88 Stat. 612 (1974); Kelley, 35 F.3d at 269 n. 3; Roberts, 998 F.2d at 828; Cohen I, 991 F.2d at 895. Under Chevron, where Congress has expressly delegated to an agency the power to "elucidate a specific provision of the statute by regulation," that agency's regulations should be accorded "controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." Chevron USA v. NRDC, 467 U.S. 837, 843-44, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

[7] Appellees deem Chevron inapplicable on the ground that OCR's interpretation violates the plain meaning of the statute. [FN6] Under their interpretation, Title IX bars universities from disadvantaging any *771 student athlete on the basis of his or her gender. But the plain meaning of the nondiscrimination principle set forth in 20 U.S.C. § 1681(a) does not bar remedial actions designed to achieve substantial proportionality between athletic rosters and student bodies.

Indeed, Appellees' interpretation of 20 U.S.C. § 1681(a)'s plain meaning would render 1681(b) superfluous. After all, § 1681(b) states that Title IX does not require

FN6. 20 U.S.C. § 1681(a) reads:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance....

any education institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community.... [FN7]

FN7. Because the OCR's three-part test gives universities two avenues other than substantial proportionality for bringing themselves into Title IX compliance, it does not conflict with § 1681(b).

If § 1681(a) already bars the type of remedial action that Appellant engaged in pursuant to the consent decree, then § 1681(b)'s provision that Title IX does not require such remedial action would be mere surplusage. "Statutes must be interpreted, if possible, to give each word some operative effect." Walters v. Metropolitan Educ. Enters., Inc., 519 U.S. 202, 209, 117 S.Ct. 660, 136 L.Ed.2d 644 (1997).
Moreover, we deem it highly instructive that, at oral argument, Appellees conceded that their proposed interpretation of Title IX, whereby a university could permissibly discriminate on the basis of sex in order to ensure that each gender's interests in athletic participation were equally accommodated, is just as contrary to 1681(a)'s purported plain meaning as the interpretation advanced by the OCR and Appellants is.

We also note that Appellees' interpretation of Title IX's text has been rejected explicitly by the Seventh Circuit, see Kelley, 35 F.3d at 270, as well as the OCR, and implicitly rejected by the other circuits that have held that a school may cut the

number of male athletic slots in order to bring itself into compliance with Title IX. See Horner, 43 F.3d at 275; Roberts, 998 F.2d at 830; Cohen I, 991 F.2d at 898 n. 15. Under such circumstances, it is clear that OCR's interpretation of Title IX's athletics provisions merits deference under Martin and Chevron. In Cohen II and Kelley the courts held that 34 C.F.R. § 106.41 deserved controlling weight under Chevron and that the OCR Policy Interpretation deserved substantial deference under Martin. See Cohen II, 101 F.3d at 173; Kelley, 35 F.3d at 270-71; see also Favia v. Indiana Univ. of Penn., 812 F.Supp. 578, 584 (W.D.Pa.) (holding that "OCR's policy interpretation deserves our great deference" under Chevron), aff'd 7 F.3d 332 (3d Cir.1993). Similarly, in the case before us, the 1996 OCR Clarification and the Cantu letter explaining it merit deference under Martin. These clarifications essentially adopted the reasoning of Cohen I as OCR policy. Under these clarifications' clear wording, an institution in which male athletes are overrepresented can bring itself into Title IX compliance by reducing sufficiently the number of roster spots available to men.

Finally, the district court below rejected the interpretation of Title IX advocated by the OCR and Appellants on the ground that such a reading of the statute might violate the Constitution. In the court's words, OCR's interpretation would
effectively transform Title IX from an anti-discrimination statute to a statute enacted to remedy past discrimination, thus subjecting it to heightened scrutiny. Without speculating whether Title IX would survive such searching constitutional scrutiny, the court notes that it remains unsatisfied with the Cohen majority's treatment of these important questions. The court is satisfied that avoiding serious constitutional questions *772 such as an equal protection challenge to a very important Congressional statute is itself ample reason for rejecting the safe harbor idea as part of Title IX.

The district court thus strained to interpret Title IX in a way that ostensibly would avoid these concerns. In doing so, it followed the interpretive methodology laid out by the Supreme Court in NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 99 S.Ct. 1313, 59 L.Ed.2d 533 (1979). Chief Justice Burger, writing for the Catholic Bishop majority, announced that the Court would decline to construe an act of Congress "in a

manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religious Clauses." Id. at 507, 99 S.Ct. 1313; see also Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."); William N. Eskridge, Jr. & Philip P. Frickey, Legislation: Statutes and the Creation of Public Policy 675-87 (2d ed.1995) (discussing Catholic Bishop and the canon of construing statutes so as to avoid constitutional problems). Under Catholic Bishop, the inquiry properly raised on appeal is not whether the OCR's interpretation of Title IX is unconstitutional, but whether it "raises serious constitutional questions." We answer that question in the negative.

The First and Seventh Circuits both have considered at length the constitutionality of the first prong of the OCR's test. In Cohen I, 991 F.2d at 899-901; Cohen II, 101 F.3d at 181-84; and Kelley, 35 F.3d at 272-73, the courts emphatically rejected the claim that the Policy Interpretation was unconstitutional under the Fourteenth Amendment. The separate reasoning in the two Cohen opinions is particularly well- developed. It applied intermediate scrutiny, which we would also do were we addressing the constitutional merits. See Coalition for Econ. Equity v. Wilson, 122 F.3d 692, 702 (9th Cir.1997) ("When the government classifies by gender, it must demonstrate that the classification is substantially related to an important governmental interest, requiring an 'exceedingly persuasive' justification."). Cohen II noted that the Policy Interpretation furthered the "clearly important" objectives of "avoid[ing] the use of federal resources to support discriminatory practices, and provid[ing] individual citizens effective protection against those practices." 101 F.3d at 184 (citation and internal quotations omitted). Moreover, it found that "judicial enforcement of federal anti-discrimination statutes is at least an important governmental objective." Id. And Cohen II held that the district court's relief, which was essentially identical to what the OCR Policy Interpretation calls for, was "clearly substantially related" to these objectives. Id.

Along the same lines, the Seventh Circuit has held that "the remedial scheme established by Title IX and the applicable regulation and policy interpretation are clearly substantially related to" the objective of prohibiting "educational institutions from discriminating on the basis of sex." Kelley, 35 F.3d at 272. We adopt the reasoning of Cohen I, Cohen II, and Kelley, and hold that the constitutional analysis contained therein persuasively disposes of any serious constitutional concerns that might be raised in relation to the OCR Policy Interpretation. [FN8] The district court's *773 final basis for rejecting the OCR's interpretation of Title IX was therefore erroneous.

FN8. The amicus brief filed by USA Wrestling and a number of other organizations repeatedly invokes the Adarand Constructors v. Pena, 515 U.S. 200, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) line of cases and Title VII precedents to suggest that the scope of remedial action to correct for disparities among groups is quite limited. Those precedents are not relevant in the context of collegiate athletics. Unlike most employment settings, athletic teams are gender segregated, and universities must decide beforehand how many athletic opportunities they will allocate to each sex. As a result, determining whether discrimination exists in athletic programs requires gender-conscious, group-wide comparisons. Because men are not "qualified" for women's teams (and vice versa), athletics require a gender conscious allocation of opportunities in the first instance. The paradigm that has motivated the Supreme Court's more recent reverse-discrimination jurisprudence simply does not fit the case at bar. See Cohen II, 101 F.3d at 181 ("[W]hile Adarand does make new law, the law it makes is wholly irrelevant to the disposition of this appeal....").

IV.

This past summer, 90,185 enthusiastic fans crowded into Pasadena's historic Rose Bowl for the finals of the Women's World Cup soccer match. An estimated 40 million television viewers also tuned in to watch a thrilling battle between the American and Chinese teams. The match ended when American defender Brandi Chastain fired the ball past Chinese goalkeeper Gao Hong, breaking a 4-4 shootout tie. See Grant

Wahl, Out of this World with the Cup on the Line, A Last-Second Hunch and a Clutch Left Foot Lifted the U.S. to a Breathtaking Victory over China, Sports Illustrated, July 19, 1999, at 38. The victory sparked a national celebration and a realization by many that women's sports could be just as exciting, competitive, and lucrative as men's sports. And the victorious athletes understood as well as anyone the connection between a 27-year-old statute and tangible progress in women's athletics. See Scott M. Reid, Title IX Scores Big for U.S. Soccer, Orange County Reg., July 6, 1999, at D1 (quoting Chastain's statement that "all of this is because of Title IX"); Patrick Hruby, On Top of the World Scurry Saves Day, Chastain Wins It for U.S., Wash. Times, July 11, 1999, at A1 (quoting defender Kate Sobrero's statement that "we're all Title IX babies, and this shows it's working"). Title IX has enhanced, and will continue to enhance, women's opportunities to enjoy the thrill of victory, the agony of defeat, and the many tangible benefits that flow from just being given a chance to participate in intercollegiate athletics. Today we join our sister circuits in holding that Title IX does not bar universities from taking steps to ensure that women are approximately as well represented in sports programs as they are in student bodies. We REVERSE, and VACATE the preliminary injunction.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

NEAL vs. BOARD OF TRUSTEES
No. CV-F-97-5009 REC

ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION BY DISTRICT COURT OF MAGISTRATE JUDGE'S DISCOVERY RULING

On July 17, 2000, the court heard plaintiffs' Motion for Reconsideration by District Court of Magistrate Judge's Discovery Ruling.

Upon due consideration of the written and oral arguments of the parties and the record herein, the court denies this motion for the reasons set forth herein.

In Neal v. Bd. of Trustees of Cal. State Universities, 198 F.3d 763 (9th Cir. 1999), the Ninth Circuit reversed and vacated the preliminary injunction issued by this court in this action.

Following the Ninth Circuit's vacation of the preliminary injunction, the parties appeared before Magistrate Judge Snyder in connection with lifting the stay of discovery that had been imposed during the appeal. Magistrate Snyder allowed certain discovery to proceed but found "all discovery related to students' interests in athletics to be irrelevant. 198 F.3d @ 771; see Stip. 7:3-4."

B. Request for Reconsideration.

Plaintiffs move the court to reconsider this ruling by the Magistrate.

Pursuant to Rule 72-303(f), Local Rules of Practice, the court reviews this request for reconsideration under the "clearly erroneous or contrary to law" standard.

Rule 26(b)(1), Federal Rules of Civil Procedure, provides in pertinent part that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter in the pending action ..." Furthermore, "[t]he information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Id. The Federal Rules of Civil Procedure creates a "broad right of discovery" because "wide access to relevant facts serves "the integrity and fairness of the judicial process by promoting the search for the truth." Shoen v. Shoen, 5 F.3d 1289, 1292 (9th Cir. 1993). As explained in Wright, Miller & Marcus, 8 Federal Practice and Procedure. § 2008, pp. 107-109 (1994):

The boundaries defining information that is relevant to the subject matter involved in the action are necessarily vague and it is practically impossible to state a general rule by which they can be drawn. Certainly the requirement of relevancy should be construed liberally and with common sense, rather than in terms of narrow legalisms. No one would suggest that

discovery should be allowed of information that has no conceivable bearing on the case. But it is not too strong, to say that a request for disdovery should be considered relevant if there is any possibility that the information sought may be relevant to the subject matter of the action.

Even given this broad standard, courts have held that the lower court abused it discretion in allowing discovery. See, e.g., Epstein v. MCA. Inc., 54 F.3d 1422, 1423 (9th Cir. 1995)(holding that the district court abused its discretion in allowing discovery of documents that "would have no bearing on either the merits of the case or on the motion for class certification."); see also In re Fontaine, 402 F.Supp. 1219, 1221 (E.D.N.Y. 1975)("While the standard of relevancy [in discovery] is a liberal one, it is not so liberal as to allow a party 'to roam in shadow zones of relevancy and to explore matter which does not presently appear germane on the theory that it might conceivably become so.'").

Plaintiffs contend that the Magistrate's ruling precluding discovery on student athletic interest is contrary to law in two respects.

First, plaintiffs assert, student athletic interest is directly and explicitly relevant under Title IX's regulations. Second, plaintiffs contend, the Ninth Circuit's opinion in Neal makes the discovery sought relevant because the Ninth Circuit has indicated that creating proportionality at CSUB will remedy discrimination against females. Plaintiffs argue that discovery on the expressed athletic interests of a school's male and female students will address whether there is in fact any discrimination against females at CSUB to remedy. In addition, plaintiffs contend, the Ninth Circuit has directed the court to defer to the OCR's Policy Interpretation of Title IX, several provisions of which make student athletic interest relevant in a Title IX case.

However, as defendants respond, the Ninth Circuit was explicit in its rejection of plaintiff's interest-based test, making the discovery sought by plaintiffs irrelevant under the standards set forth above.

Plaintiffs respond that the Ninth Circuit's opinion, when read closely, with the language of Title IX and its regulations in mind, contains grounds for concluding that student athletic interest remains relevant in this case. Plaintiffs assert that the Ninth Circuit's opinion ^can read to conclude that failure to accommodate the athletic interests of men and women equally is not in itself a violation of Title IX." However, plaintiffs argue, the Ninth Circuit did not hold that the accommodation of the interests of males and females is not relevant in determining compliance with Title IX, thus leaving open the possibility that "vastly unequal accommodation of the interests of one sex relative to the other would be a factor in determining compliance with Title IX."

Plaintiffs further assert that the law of the case applies only to an appellate court's conclusions of law. However law of the case does not apply to factual assertions. Plaintiffs contend that the Ninth Circuit's conclusion that females at CSUB "face discrimination and lower athletic opportunities than males is an assertion of fact", and therefore is not binding on the district court. Plaintiffs contend that this should not preclude them from developing a complete factual record on the issue of whether females or males have lower athletic opportunities. To do so, plaintiffs assert, would be contrary to the Ninth Circuit's instruction that its opinions concerning preliminary injunctions are not reliable indicators of subsequent rulings on appeal from a final judgment because the fully developed factual record may be materially different from that before the district court at the time of the ruling on the preliminary injunction. Sports Form, Inc. v. United Press International, Inc., 686 F.3d 750, 752 (9th Cir. 1982).

The court does not agree with plaintiffs' assertions. The Ninth Circuit explicitly rejected as a matter of law plaintiffs/appellees' assertion that "gender-conscious remedies are appropriate only when necessary to ensure that schools provide opportunities to males and females in proportion to their relative levels of interest in sports participation." The Ninth Circuit explicitly accepted defendants/appellants' assertion that "schools may make gender-conscious decisions about sports-funding

levels to correct for an imbalance between the composition of the undergraduate student body and the composition of

undergraduate student athletic participants pool." Relying on Cohen, the Ninth Circuit held that "[a]dopting Appellees' interest-based test for Title IX compliance would hinder, and quite possibly reverse, the steady increases in women's participation and interest in sports that have followed Title IX's enactment." The Ninth Circuit then held that "[i]f a university wishes to comply with Title IX by leveling down programs instead of racheting them up, as Appellant has done here, Title IX is not offended." These holdings make plaintiffs' requested discovery irrelevant because there can be no violation of Title IX by a university if participation levels for each gender are "substantially proportionate" to their representation in the student body. Therefore, the court cannot conclude that the Magistrate's order was clearly erroneous or contrary to law.

ACCORDINGLY, IT IS ORDERED that plaintiffs' Motion for Reconsideration by District Court of Magistrate Judge's Discovery Ruling is denied.

Dated: July 27, 2000

ROBERT E. COYLET
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
NEAL vs. BOARD OF TRUSTEES

No. CV-F-97-5009 REC

ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DIRECTING ENTRY OF JUDGMENT FOR DEFENDANTS (Docs 204 & 222)

On July 2, 2001, the court heard plaintiffs' motion for summary judgment and defendants' motion for summary judgment. Upon due consideration of the written and oral arguments of the parties and the record herein, the court denies plaintiffs' motion and grants defendants motion and directs entry of judgment for defendants.

Plaintiffs in this action are male and female members of the wrestling team at California State University/ Bakersfield (CSUB) and several organizations that plaintiffs claim have an interest in wrestling. Defendants are the Board of Trustees of the California State University, CSUB, the Chancellor of the California State University, the President of CSUB, and the Athletic Director of CSUB. The parties have stipulated to the filing of a Third Amended Complaint. The Third Amended Complaint for Damages and Injunctive and Declaratory Relief alleges in Count I sex discrimination in violation of 20 U.S.C. § 1681; in Count II deprivation of rights under color of law in violation of 42 U.S.C. § 1983, and causes of action for injunctive and declaratory relief.1

Both parties have filed motions for summary judgment and/or summary adjudication.

A. Procedural Background.

On December 26, 1997, the court issued its Order Granting in Part and Denying in Part Defendants' Motion to Dismiss (hereinafter referred to as the December 26 Order). In pertinent part, defendants moved to dismiss the claim of sex discrimination in violation of Section 1681 (Title IX) on the ground that neither the proportionality rule of the three-part test implemented by the OCR in the Policy Interpretation, nor the San

1 There is no cause of action in the third Amended Complaint as there was in the Second Amended Complaint for race discrimination in violation of Title VI, 42 U.S.C. § 2000d et seq. Although defendants move for summary judgment with respect to this cause of action, the fact that the Third Amended Complaint deletes the cause of action moots this portion of the defendants' motion for summary judgment. In addition, the allegations in the Third Amended Complaint referring to race or ethnic group discrimination are irrelevant and are stricken from the Third Amended Complaint.

Francisco Superior Court's reliance on it violates Title IX. Defendants argued that the court should read the first prong of

the three-part test as a "safe harbor", i.e., that the court should conclude that an institution is automatically in compliance with Title IX if it has achieved substantial proportionality in the number of men and women participating in the athletic program when compared to the gender makeup of the institution. In denying this portion of the motion to dismiss, the court discussed and distinguished Cohen v. Brown University, 991 F.2d 888 (1st Cir. 1993)(Cohen I) and Cohen v. Brown University, 101 F.3d 155 {1st Cir. 1996)(Cohen II), electing to follow Pederson v. Louisiana State University, 912 F.Supp. 892 (M.D.La. 1996), aff'd in part and reversed in part. 213 F.3d 858 (5th Cir. 2000). On February 22, 1999, the court granted plaintiffs' motion for preliminary injunction, ruling in pertinent part:

The court concludes from the record before it that plaintiffs have demonstrated a likelihood of success on the merits of their claim Chat the capping of the size of the male athletic teams at CSUB violates Title IX. The court is persuaded that plaintiffs have demonstrated that primary purpose for the capping of the men's athletic teams is gender-based in order to meet gender proportionality requirements. As this court implies in the December 26 Order rejecting defendants' argument that the first part of the Three-Part test should be construed as a 'safe harbor7, an effort to obtain proportionality is not a shield against liability under Title IX. Although all the court did by its ruling in the December 26 Order was deny a motion to dismiss based on a certain construction of the first prong of the Three-Part Test, the court concludes that relying on proportionality to cap the men's athletic teams at CSUB in order to comply with the Consent Decree constitutes implementation of a quota based on gender in violation of Title IX.

In Neal v. Bd. of Trustees of Cal. State Universities, 198 F.3d 763 (9th Cir. 1999), the Ninth Circuit reversed the preliminary injunction.

On July 27, 2000, the court issued its Order Denying Plaintiffs' Motion for Reconsideration by District Court of Magistrate Judge's Discovery Ruling. In this ruling, the court affirmed the Magistrate's ruling that "all discovery related to

students' interests in athletics [is] irrelevant", ruling in pertinent part:

Plaintiffs contend that the Magistrate's ruling precluding discovery on student athletic interest is contrary to law in two respects.

First, plaintiffs assert, student athletic interest is directly and explicitly relevant under Title IX's regulations. Second, plaintiffs contend, the Ninth Circuit's opinion in Neal makes the discovery sought relevant because the Ninth Circuit has indicated that creating proportionality at CSUB will remedy discrimination against females. Plaintiffs argue that discovery on the expressed athletic interests of a school's male and female students will address whether there is in fact any discrimination against females at CSUB to remedy. In addition, plaintiffs contend, the Ninth Circuit has directed the court to defer to the OCR's Policy Interpretation of Title IX, several provisions of which make student athletic interest relevant in a Title IX case.

However, as defendants respond, the Ninth Circuit was explicit in its rejection of plaintiff's interest-based test, making the discovery sought by plaintiffs irrelevant under the standards set forth above [governing relevance for discovery purposes under Rule 26(b) (1)].

Plaintiffs respond that the Ninth Circuit's opinion, when read closely, with the language of Title IX and its regulations in mind, contains grounds for concluding that student athletic interest remains relevant in this case. Plaintiffs assert that the Ninth Circuit's opinion 'can read to conclude that the failure to accommodate the athletic interests of men and women equally is not in itself a violation of Title IX.' However, plaintiffs argue, the Ninth Circuit did not hold that the accommodation of the interests of males and females is not relevant in determining compliance with Title IX, thus leaving open the possibility that 'vastly unequal accommodation of the interests of one sex relative to the other would be a factor in determining compliance with Title IX.'

Plaintiffs further assert that the law of the case applies only to an appellate court's conclusions of law. However, law of the

case does not apply to factual assertions. Plaintiffs contend that the Ninth Circuit's conclusion that females at CSUB 'face discrimination and lower athletic opportunities than males is an assertion of fact', and therefore is not binding on the district court. Plaintiffs contend that this should not preclude them from developing a complete factual record on the issue of whether females or males have lower athletic opportunities. To do so, plaintiffs assert, would be contrary to the Ninth Circuit's instruction that its opinions concerning preliminary injunctions are not reliable indicators of subsequent rulings on appeal from a final judgment because the fully developed factual record may be materially different from that before the district court at the time of the ruling on the preliminary injunction. Sports Form. Inc. v. United Press International, Inc., 686 P.3d [sic] 750, 752 (9th Cir. 1982).

The court does not agree with plaintiffs' assertions. The Ninth Circuit explicitly rejected as a matter of law plaintiffs/appellees' assertion that 'gender-conscious remedies are appropriate only when necessary to ensure that schools provide opportunities to males and females in proportion to their relative levels of interest in sports participation." The Ninth Circuit explicitly accepted defendants/appellants' assertion that 'schools may make gender-conscious decisions about sports-funding levels to correct for an imbalance between the two composition of the undergraduate student body and the composition of undergraduate student athletic participants pool.' Relying on Cohen, the Ninth Circuit held that [a]dopting Appellees' interest-based test for Title IX compliance would hinder, and quite possibly reverse, the steady increases in women's participation and interest in sports that have followed Title IX's enactment.' The Ninth Circuit then held that '[i]f a university wishes to comply with Title IX by leveling down programs instead of racheting them up, as Appellant has done here. Title IX is not offended.' These holdings make plaintiffs' requested discovery irrelevant because there can be no violation of Title IX by a university if participation levels for each gender are 'substantially proportionate' to their representations in the student body. Therefore, the court cannot conclude that the Magistrate's order was clearly erroneous or contrary to law.

B. Plaintiff's Assertion of Judicial Estoppel.

In plaintiffs' memorandum in Support of their motion for summary judgment and in their opposition to defendants' motion for summary judgment, plaintiffs present many and lengthy excerpts from various pleadings, motions and briefs filed by the Board of Trustees of the California State University in California National Organization for Women v. Board of Trustees of the California State University, San Francisco County Superior Court Case No. 949207 (hereinafter referred to as the Cal-NOW litigation). This litigation was settled, the terms of the settlement embodied in a Consent Decree. Plaintiffs assert that the factual assertions made by defendants in connection with the Cal-NOW litigation are "all diametrically opposed to their current positions in this lawsuit" and that defendants should be judicially estopped from asserting the following:

1. The opportunities offered to females to participate in intercollegiate activities at CSUB is determined by the number of actual female athletic participants;

2. If females are a lower percentage of CSUB's athletes than its students, they are being discriminated against;

3. Females have the exact same interest in competing in intercollegiate athletics as males. Any evidence to the contrary submitted by plaintiffs [sic] are 'stereotypes';
4. Proportionality is an appropriate standard of compliance with a statute Chat does not require gender proportionality;

5. Females have not had the same opportunity as males to participate in intercollegiate athletics at CSUB. »Equal opportunity' means female athletic participation in the same proportion as female representation in CSUB's student body;

6. "CSUB should not be required-to-match opportunities to its students' interest and abilities, because determining interest would be impractical.

As explained in Rissetto v. Plumbers and Steamfitters Local 343, 94 F.3d 597, 600-601 (9th Cir. 1996):

Judicial estoppel, sometimes also known as the doctrine of inconsistent positions, precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position ... In Russell fv. Rolfs. 893 F.2d 1033 (9th Cir. 1990), cert. denied, 501 U.S. 1260 ...(1991)], we explained that:

The policies underlying preclusion of inconsistent positions are general considerations of the orderly administration of justice and regard for the dignity of judicial proceedings ... Judicial estoppel is intended to protect against a litigant playing fast and loose with the courts ... Because it is intended to protect the dignity of the judicial process, it is an equitable doctrine invoked by a court at its discretion.

893 F.2d at 1037. In Yanez [v. United States, 989 F.2d 323 (9th Cir. 1993)], we observed that the doctrine of judicial estoppel remains unsettled.

The majority of circuits recognizing the doctrine hold that it is inapplicable unless the inconsistent statement was actually adopted by the court in the earlier litigation ... The minority view, in contrast, holds that the doctrine applies even if the Litigant was unsuccessful in asserting the inconsistent position, if by his change ofposition he is playing 'fast and loose' with the court .... In either case, the purpose of the doctrine is to protect the integrity of the judicial process.

989 F.2d at 326 ...

This Circuit has not yet had the occasion to decide whether to follow the 'majority' view or the 'minority' view. In many of our cases, the apparently inconsistent position was not really incompatible with the party's earlier position ... or the party's change in position was justified ... [T]his case does not require us to decide what version of the doctrine to apply, so we leave that question for another day.

From the court's research, the Ninth Circuit still has not decided this issue. "'Judicial estoppel applies when a party's position is "tantamount to a knowing misrepresentation to or even fraud on the court."'" Wvler Summit v. Turner Broadcasting System, 235 F.3d 1184, 1190 (9th Cir. 2000).

"[J]udicial estoppel is an equitable doctrine, invoked by a court at its own discretion, and driven by the specific facts of a case." Johnson v. State of Oregon. 141 F.3d 1361, 1368 (9th Cir. 1998). Defendants argue that the court should not invoke judicial estoppel as argued by plaintiffs:

More than seven years ago, in litigation in a different court involving different parties, the University asserted, in good faith, a factual argument that the court declined to adopt. The University is not now estopped from asserting its current good faith position that it should abide by the OCR regulations regarding the gender proportionality standard. ...

The court declines to invoke judicial estoppel for several reasons. First is the different procedural posture of the two cases and the intervening Consent Decree, the terms of which bind the defendants. Secondly, if the "majority" view is used, given the terms of the Consent Decree, any assertedly inconsistent position taken by defendants was not adopted by the San Francisco County Superior Court in the Cal-NOW litigation. Thirdly, even if the minority view is used, the court is not persuaded that defendants are playing "fast and loose" with the court or that their positions in the instant case are tantamount to a knowing misrepresentation to or fraud on the court.

C. Generally Relevant Statutes. Regulation and Policy Interpretation.

Section 901(a) of Title IX, 20 U.S.C. § 1681 (a), provides:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance ...

Section 1681(b) provides:
Nothing contained in subsection (a) of this section shall be interpreted to require any education institution to grant preferential treatment or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally

supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: Provided, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of benefits of, any such program or activity by the members of one sex.

The United States Department of Education, Office for Civil Rights (OCR) has enacted regulations implementing Title IX set forth in 34 C.F.R. Part 106. In 1979, the Department of Health and Human Services issued a Policy Interpretation concerning Title IX and intercollegiate activities. 44 Fed.Reg. 71413 et seq. (hereinafter referred to as the Policy Interpretation). Included in the Policy Interpretation is what is known as the Three-Part Test:

5. Application of the Policy - Levels of Competition.

In effectively accommodating the interests and abilities of male and female athletes, institutions must provide both the opportunity for individuals of each sex to participate in intercollegiate competition, and for athletes of each sex to have competitive team schedules which will equally reflect their abilities.

a. Compliance will be assessed in any one of three ways:

(1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or

(2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex? or

(3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and

abilities of the members of that sex have been fully and effectively accommodated by the present program. On January 16, 1996, the OCR released its "Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test" (hereinafter referred to as the Clarification). The Clarification states in pertinent part:

[T]he three-part test furnishes an institution with three individual avenues to choose from when determining how it will provide individuals of each sex with nondiscriminatory opportunities to participate in intercollegiate activities. If an institution has met any part of the three-part test, OCR will determine that the institution is meeting this requirement.

Under part one of the three-part test (part one), where an institution provides intercollegiate level athletic opportunities for male and female students in numbers substantially proportionate to their respective full-time undergraduate enrollments, OCR will find that the institution is providing nondiscriminatory participation opportunities for individuals of both sexes.

On October 30, 1993, the Board of Trustees of the California State University entered into a consent decree ordered by Judge Raymond J. Arata, Jr., Presiding Judge of the Sari Francisco County Superior Court, in California National Organization for Women v. Board of Trustees of the California State University. Case No. 949207. In pertinent part the consent decree mandates that each California State University campus have a proportion of female athletes that is within five percentage points of the proportion of female undergraduates at that school. This portion of the consent decree was patterned after the first part of the Three-Part Test promulgated by"OCR.
D. Plaintiffs' Motion for Summary Judgment.

I. CSUB's Elimination of Male Athletes Conflicts with Previous Ninth Circuit Decisions Construing Sex Discrimination Statutes.

Plaintiffs argue that defendants' elimination of male athletes to create gender proportionality is contrary to three Ninth Circuit decisions.

In so arguing, plaintiffs refer the court to Jeldness v. Pearce. 30 F.3d 1220 (9th Cir. 1994).

In Jeldness, a class of women prisoners incarcerated in state prison brought an action alleging that the Oregon State Department of Corrections discriminated against women inmates in providing educational and vocational opportunities in violation of Title IX and the Equal Protection Clause of the Fourteenth Amendment. Plaintiff asserts that Jeldness states that the interests of males and females had to be assessed and considered in designing prison education programs, that the programs offered to men and women could differ depending on interest and need, and that the number of classes offered should be proportionate to the number of inmates desiring to take education programs, citing 30 F.3d at 1229. Plaintiffs argue that, under these standards set forth in Jeldness, defendants may not eliminate male athletes simply to create gender proportionality, with no regard fro the number of men versus women who express a desire to-play sports.

In Neal, the Ninth Circuit stated in pertinent part:

...Adopting Appellees' interest-based test for Title IX compliance would hinder, and quite possibly reverse, the steady increases in women's participation and interest in sports that have followed Title IX's enactment.5

5 We also view as instructive this Court's precedent in Jeldness v. Pearce, 30 F.3d 1220 (gen cir. 1994). That case involved a Title IX suit brought by female prisoners that challenged the lack of vocational educational programs in women's facilities relative to those available in men's facilities. Although the regulations at issue in Jeldness are different from those at issue here, the prison context is somewhat analogous because, as with college athletic teams, 'sex segregation is the accepted norm' in prisons. Id. at 1228. In Jeldness. we rejected the view that differing interest levels among the genders would justify providing women with significantly fewer educational opportunities than men. See id. at 1229.

198 F.3d at 769 & n.5.

Plaintiffs argue that Neal misreads and misapplies Jeldness in footnote 5. Plaintiffs assert:

Jeldness does not discuss or suggest anything about men and women having different interest levels in prison educational programs or any other activity. Rather, Jeldness states, in essence, that the substantially lower number of female inmates in Oregon's prison system would not justify providing a substantially or proportionally smaller number of courses for women, because this would mean women would have a much smaller course selection compared to men. For example, if there were 1,000 male prisoners and 40 female prisoners, and the state provided 100 classes "for men and 4 for women (proportional to the numbers of males and females), the each male could choose from among 100 classes, but each female would have only 4 classes to choose from. Jeldness says this would not be 'equal opportunity'.

Jeldness holds that prison educational programs subject to Title IX must be "equally" available to male and female inmates. 30 F.3d at 1228. Jeldness then discussed what this "equality" means in a prison setting, concluding that Title IX and its regulations do not require gender-integrated classes in prisons, and further stating:

If an education program takes place in the prison, exclusion of women from a particular class solely because women do not reside at the prison offering that class is not improperly segregating \separately on the basis of sex' but it is rather an activity 'separately on the basis of location.' The prohibited activity would be the offering of educational programs only in the mens prisons, without offering equivalent programs in the women's prisons. In that case, women would be ldenied the benefits of a program' on account of sex.

Strict one-for-one identity of classes may not be required by the regulations. But there must be reasonable opportunities for similar studies at the women's prison and women must have an equal opportunity to participate in educational programs. For example, the apprenticeship programs offered to men and women could perhaps differ depending on interest and need, but totally denying women access to half the apprenticeship opportunities men have would seem to violate the regulations.

In this case, women were denied access to all of the mechanical trade apprenticeships. And facilities such as labs, classrooms, and workshops must be comparable to each other.

It may not be necessary to offer as many classes in a small women's prison as in the larger men's prisons. But the number of classes offered should be proportionate, not just to the total number of inmates, but to the number of inmates desiring to take educational programs. And the inmates must be made aware of the opportunity for participation in various programs before their interests can be assessed. In order to give women 'equal opportunity,' there may need to be a higher number of courses offered so that women have comparable variety in course selection.

Neither this appellate court, nor perhaps even a state or federal district court, can define the precise type and number of educational and work programs to be offered to the genders in prison. The role of the judicial branch is not to take over those important and difficult functions of the executive branch. Rather, the judicial branch can only define the boundaries of what is required of the executive branch by Congress and by the constitution. It is clear to this court that state prisons receiving federal funds are required by Title IX to make reasonable efforts to offer the same educational opportunities to women as to men. Although the programs need not be identical in number or content, women must have reasonable opportunities for similar studies and must have an equal opportunity to participate in programs of comparable quality. These are the standards which the district court must attempt to apply on the remand of the issue of equality under Title IX. 30 F.3d at 1229.

The court reads nothing in Jeldness that supports plaintiffs' assertion that "under these standards set forth in Jeldness, defendants may not eliminate male athletes simply to create gender proportionality, with no regard for the number of men versus women who express a desire to play sports."

Furthermore, as Neal noted, it was discussing Jeldness by analogy because of the different regulations involved. The court is not persuaded by plaintiffs' arguments that Neal

misread and misapplied Jeldness or that Jeldness establishes that the legal conclusions reached by Neal are wrong.2

Plaintiffs further argue that defendants' reliance on gender participation rates to justify reducing male athletes at CSUB conflicts with Stanley v. University of Southern California, 178 F.3d 1069 (9th Cir.), cert. denied. 528 U.S. 1022 (1999) (Stanley II).

In Stanley II, the former head coach of the women's basketball team sued the University and its athletic director, alleging violations of the Equal Pay Act and breach of contract because of defendants' failure to pay her a salary equivalent to that being paid to the men's basketball coach. The Ninth Circuit affirmed summary judgment for defendants with respect to Stanley's claim of violation of the Equal Pay Act on the ground that Stanley failed to show any discriminatory conduct on the part of the defendants. 178 F.3d at 1073-1077. Specifically, the Ninth Circuit held:

In the end, therefore, we are left with these undisputed facts: Stanley had far less relevant experience and qualifications than Raveling. She had fourteen years less experience as a basketball coach. She, unlike Raveling, never coached the Olympic team. She had no marketing experience outside coaching. She had never written any books on basketball. Accordingly, Stanley has failed to raise a genuine issue of fact as to Raveling's markedly 'superior experience,' and qualifications ... In short, she has failed to raise a genuine issue of

2 -Plaintiffs further argue" that the analysis in Jeldness does not apply in the context of athletics. However, as Neal noted, it was looking Co Jeldness for an analogy. The conclusion in Neai is what counts.

fact as to the University's non-discriminatory reason for paying Raveling a higher salary.

178 F.3d at 1077. The Ninth Circuit then noted that Stanley claimed that defendants' conduct also violated Title IX as well as FEHA and Article I, § 8 of the California Constitution, and

ruled that "[b]ecause, as we have held above, Stanley fails to show any discriminatory conduct on the part of the defendants, all of these claims fail as well. Id.

Plaintiff infers that Stanley thus rejected the notion that a mere numerical disparity established discrimination under Title IX, instead looking at all relevant factors to determine if a numerical disparity in the situation of a male and female was caused by sex discrimination. Defendants' assumption that the number of male athletes at CSUB should be reduced just to create gender proportionality is thus fundamentally inconsistent with Stanley, since it assumes discrimination from a mere statistical disparity.

There is nothing in Stanley II supporting plaintiffs' extrapolation. As noted, because there was no evidence that the decision to pay the women's head basketball coach less than the men's basketball coach was based on sex discrimination, the Ninth Circuit did not even discuss the Title IX claim made in that case. There is no basis for plaintiffs' argument that compliance with the first part of the Three-Part Test conflicts with Stanley II.

Plaintiff further refers the court to Stanley v. University of Southern California. 13 F.3d 1313 (9th Cir. 1994)(Stanley I) as rejecting Stanley's argument that the difference in revenue generated by the men's and women's basketball teams was simply the result of societal discrimination that limited spectator interest in women's sports.

In Stanley I, the Ninth Circuit affirmed the district court's denial of a preliminary injunction. As noted above in connection with the discussion of Stanley II, the relevant legal claim was under the Equal Pay Act. In affirming the district court's conclusion that Stanley had failed to demonstrate a likelihood of success on the merits of her claim of denial of equal pay for equal work, Stanley I stated in pertinent part:

The district court also was 'unconvinced' by Coach Stanley's claim that USC's disparate promotion of men's and women's basketball teams had 'caused the enormous differences in spectator interest and revenue production.' The court rejected Coach Stanley's assertion that the differences were due to

societal discrimination and that this was evidence of a prima facie case under the [Equal Pay Act]. The court reasoned that societal discrimination in preferring to witness men's sports in greater numbers cannot be attributed to USC. We agree. Cf. Madison, 818 F.2d at 580-82 (EPA does not prohibit wages that reflect market conditions of supply and demand, which may depress wages in jobs held mainly by women).

Plaintiffs assert that defendants have never claimed that they did anything to cause females to participate in varsity athletics at a lower rate than males and have stipulated that defendants are not aware of any complaints or allegations of any type of unequal opportunity or discrimination against females in CSUB's athletic program. Therefore, plaintiffs argue, to the extent that defendants justify their exclusion of male athletes as countering generalized societal discrimination, their position conflicts with Stanley I.

Again, Stanley I was not dealing with or discussing Title IX. The Ninth Circuit was reviewing the conclusions of the district court in denying a preliminary injunction under the Equal Pay Act. Therefore, the court concludes that defendants' reliance on the first part of the Three-Part Test does not conflict with Stanley I.

Therefore, plaintiffs' assertion that it is entitled to summary judgment on the ground that CSUB's elimination of male athletes conflicts with previous Ninth Circuit decisions construing sex discrimination statutes is denied.

II. Reduction of Male Athletes at CSUB to Create Gender Proportionality is Contrary to Supreme Court Precedent under Title VI and Title VII.

Plaintiffs argue that the Supreme Court cases governing resolution of cases under Title VI and Title VII should be controlling in determining whether the first part of the Three-Part Test may be used by defendants in determining compliance under Title IX.

In so arguing, plaintiffs refer the court to Cannon v. University of Chicago, 441 U.S. 677 (1979) where the Supreme Court ruled that a woman alleging sex discrimination in the denial of

admission medical schools receiving federal assistance has a private cause of action under Title IX. In so ruling, the Supreme Court noted in pertinent part that the drafters of Title IX explicitly assumed that Title IX would be interpreted and applied as Title VI had been and that Congress intended to create Title IX remedies comparable to those available under Title VI. 441 U.S. at 894-703. In addition, plaintiffs refer the court to Roberts v. Colorado State Bd. of Agriculture. 998 F.2d 824 (10th Cir.), cert. denied 510 U.S. 1004 (1993). In Roberts, students and former members of a women's varsity fast pitch softball team brought suit challenging the university's discontinuation of the program. The district court issued a permanent injunction reinstating the program and the Tenth Circuit affirmed, holding that the university violated Title IX when it discontinued the program. In so holding, the Tenth Circuit ruled in pertinent part:

Finally, defendant argues that the district court errred in holding that plaintiffs were not required to show discriminatory intent. Defendant reasons that because Title IX was modeled on Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§2000d to - 4a, and because discriminatory intent is required to prove a violation of Title VI, see Guardians Ass'n v. Civil Serv. Common, 463 U.S. 582, 608 n.1 ...(1983) (Powell, J., concurring), proof of a Title IX violation must therefore also require intentional discrimination.

Defendants neglect to consider the additional holding of Guardians, that 'although Title VI itself requires proof of discriminatory intent, the administrative regulations [under Title VI] incorporating a disparate impact statement are valid.' Id. at 584 n.2 ... (opinion of White, J.). Plaintiffs' complaint alleges violations of both Title IX and of the implementing regulations. If we accept defendant's analogy to Title VI, then Guardians would permit us to find a violation of Title IX's regulations without proof of discriminatory intent. ...

Further, despite the fact that Title IX was explicitly modeled on Title VI, this court has held Chat Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to - 17, is 'the most appropriate analogue when defining Title IX's substantive standards, including the question of whether 'disparate impact' is sufficient to establish discrimination under Title IX.' Mabry

v. State Bd. of Community Colleges & Occupational Educ., 813 F.3d 311, 316 n. 6 (10th Cir.), cert. denied, 484 U.S. 849 ...(1987) ... Because it is well settled that Title VII does not require proof of overt discrimination ..., the district court did not err here in failing to require proof of discrimination.

998 F.3d at 832-833.

Plaintiffs argue that, since Title IX was modeled after Title VI and Title VII, the principles and standards developed under those statutes should apply in Title IX cases, contending: In its rulings under Title VI and Title VII, the Supreme Court has consistently held that the type of 'bottom line' statistics relied on by defendants to justify excluding male athletes create no presumption of discrimination. And even if they did, eliminating males to 'remedy' such discrimination would be invalid, because (1) there is no evidence of any discriminatory acts by CSUB that caused the discrimination; and (2) the remedy is overbroad, unrelated to any legitimate purpose, and senselessly harms males.

Plaintiffs further argue: Defendants' reliance on a deviation from gender proportionality to justify reducing CSUB's male athletes is basically an attempt to use disparate impact theory defensively. It is doubtful that this argument is available under Title IX in the first place.

Section 1681(b) of the statute, as well as the administrative regulations and original interpretations [see infra] , seem to preclude a disparate impact claim. In addition, the Supreme Court has recently reaffirmed that, at least for damage claims under Title IX, proof of intentional discrimination by the recipient of federal educational funds is required. Davis v. Monroe County Board of Education, 526 U.S. 629, 644-645 (1999). Finally, the Supreme Court has held that Title VI requires proof of discriminatory intent. Regents of the University of California v. Bakke. 438 U.S. 265, 300-301 (1978); Guardians Association v. Civil Service Commission. 463 U.S. 582, 608 (1983). However, if disparate impact can give rise to a violation of Title IX, then the limitations of disparate impact theory established by the Supreme Court under Title IX should also apply, particularly since the

language of Title IX dealing with statistical disparities was expressly modeled after Title IX.

The court cannot accept plaintiffs' argument. Defendants are not asserting a violation of Title IX, plaintiffs are. Plaintiffs go on to argue that defendants ^can show no facially neutral policy that has a disparate impact on females at CSUB." In so arguing, plaintiffs note that, to establish a prima facie case of disparate impact under Title VII, the plaintiff must do more than show a statistical disparity in the work force and must identify a specific employer practice that has a disparate impact on a particular protected group. See Watson v. Fort Worth Bank and Trust. 487 U.S. 977, 994-995 (1988).

Plaintiffs assert:

In this case, defendants identify no such factor or practice causing a lower percentage of female rather than male students to, participate in sports. To the extent defendants suggest that providing athletic opportunities according to demand has a disparate impact on women, there would be a legitimate, non-discriminatory reason for this policy: Schools have an interest in meeting the interests of their students, particularly since the regulations - as written - require it. This interest would be a defense to a disparate impact claim

Plaintiffs argument simply does not make sense. Again, plaintiffs are alleging a violation of Title IX, not the defendants.

Plaintiff further notes that "[i]n a long line of cases discussing the use of statistics to prove discrimination under Title VII, the Supreme Court has consistently held that the appropriate comparison is between the percentage of individuals of a particular race or gender selected for a benefit, and the percentage of that group among the qualified applicants." See, e.g.. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 650-655 (1989). Plaintiffs argue:

In this case, comparing the gender makeup of CSUB's athletes to the gender makeup of its student body is the wrong comparison, because the student body contains many students who are not, and will not be 'qualified applicants/ for athletic

teams. The comparison therefore does not demonstrate discrimination or unequal opportunity. The appropriate comparison would be between athletes and those students who have the interest and ability to participate in intercollegiate athletics. A reasonable surrogate for that pool would be the students who try out for the school's athletic teams, plus current and prospective students who indicate the interest and ability to compete on teams the school does not presently have. Focusing on this group would be consistent with the letter and spirit of Title IX.

Once again, the court notes that plaintiffs are alleging a violation of Title IX by defendants, not vice versa. Plaintiff; reliance on Title VII cases holding what the plaintiff in a Tit: VII case must show is beside the point.

Furthermore, the decisions of the First Circuit on this issue are instructive. In litigation in Cohen v. Brown University, student members of the women's gymnastics and volleyball teams which had been demoted from full varsity status to intercollegiate club status brought a class action against t: University and others for violation of Title IX. In pertinent part, the First Circuit affirmed the district court's failure t apply Title VII standards to its analysis of whether Brown's intercollegiate athletics program complies with Title IX. In Cohen v. Brown University. 101 F.3d 155, 176-178 (1st Cir. 1996) cert. denied, 520 U.S. 1186 (1997), the First Circuit held:

It does not follow from the fact that § 1681(b) was patterned after a Title VII provision that Title VII standards should be applied to a.Title IX analysis of whether an intercollegiate athletics program equally accommodates both genders, as Brown contends. While this court has approved the importation of Title VII standards into Title IX analysis, we have explicitly limited the crossover to the employer context. See Cohen II, 991 F.2d at 902 (citing Lipsett v. "XJniversi-tv of • P:R. , "8b1T/T:^e^•Snr^9'7 f^ Cir. 1988); but see Brown v. Hot. Sexy and Safer Prods., Inc., 68 F.3d 525, 540 {1st Cir. 1995)(Title VII sexual harassment standards applied to Title IX sexual harassment case in non-employment context), cert. denied, [516 U.S. 1159 (1996)].

As Cohen II recognized, '[t]he scope and purpose of Title IX, which merely conditions government grants to educational institutions, are substantially different from those of Title VII, which sets basic employment standards.' 991 F.2d at 902 ... ' [Wlhereas Title VII is largely peremptory,' Title IX is 'largely aspirational,' and thus, a 'loosely laced buskin.' Id.; see also North Haven, 456 U.S. at 521 ... (directing that Title IX must be accorded 'a sweep as broad as its language7).

It is imperative to recognize that athletics presents a distinctly different situation from admissions and employment and requires a different analysis in order to determine the existence vel non of discrimination. While the Title IX regime permits institutions to maintain gender-segregated teams, the law does not require that student-athletes attending institutions receiving federal funds must compete on gender-segregated teams; nor does the law require that institutions provide completely gender-integrated athletic programs. To the extent that Title IX allows institutions to maintain single-sex teams and gender-segregated athletics programs/ men and women do not compete against each other for places on team rosters. Accordingly/ and notwithstanding Browns protestations to the contrary, the Title VII concept of the 'qualified pool' has no place in a Title IX analysis of equal opportunities for male and female athletes because women are not 'qualified' to compete for positions on men's teams, and vice-versa. In addition, the concept of 'preference' does not have the same meaning, or raise the same equality concerns, as it does in the employment and admissions contexts.

Brown's approach fails to recognize that, because gender-segregated teams are the norm in intercollegiate athletics programs, athletics differs from admissions and employment in analytically material ways. In providing for gender-segregated teams, intercollegiate athletics programs necessarily allocate ""opportunities separately for male and female students, and, thus, any inquiry into a claim of gender discrimination must compare the athletic participation opportunities provided for men with those provided for women. For this reason, and because recruitment of interested athletes is at the discretion of the institution, there is a risk that the institution will recruit only enough women to fill positions in a program that already under represents women, and that the smaller size of the women's

program will have the effect of discouraging women's participation.

In this unique context. Title IX operates to ensure that the gender-segregated allocation of athletics opportunities does not disadvantage either gender. Rather than create a quota or preference, this unavoidably gender-conscious comparison merely provides for the allocation of athletics resources and participation opportunities between the sexes in a non-discriminatory manner. As the Seventh Circuit observed, \Congress itself recognized that addressing discrimination in athletics presented a unique set of problems not raised in areas such as employment and academics.' Kellev, 35 F.3d at 270 ...

In contrast to the employment and admissions contexts, in the athletics context, gender is not an irrelevant characteristic. Courts and institutions must have some way of determining whether an institution complies with the mandate of Title IX and its supporting regulations to provide equal athletics opportunities for both genders, despite the fact that the institution maintains single-sex teams, and some way of fashioning a remedy upon a determination that the institution does not equally and effectively accommodate the interests and abilities of both genders. As the Kellev Court pointed out (in the context of analyzing the deference due the relevant athletics regulation and the Policy Interpretation):

Undoubtedly the_agency responsible for enforcement of the statute could have required schools to sponsor a women's program for every men's program offered and vice versa ... It was not unreasonable, however, for the agency to reject this course of action. Requiring parallel teams is a rigid approach that denies schools the flexibility to respond to the differing athletic interests of men and women. It was perfectly acceptable, therefore, for the agency to chart a different course and adopt an enforcement scheme that measures compliance by analyzing how a school has allocated its various athletic resources. Kellev, 35 F.3d at 271 ... Each prong of the Policy Interpretation's three-part test determines compliance in this manner.

Measuring compliance through an evaluation of a school's allocation of its athletic resources allows schools flexibility in meeting the athletic interests of their students and increases the chance that the actual interests of those students will be met. And if compliance with Title IX is to be measured through this sort of analysis, it is only practical that schools be given some clear way to establish that they have satisfied the requirements of the statute. The substantial proportionality contained in Benchmark 1 merely establishes such a safe harbor.

Id. ...

We find no error in the district court's refusal to apply Title VII standards in its inquiry into whether Brown's intercollegiate athletics program complies with Title IX. See Cohen II. 991 F.2d at 901 (l [T]here is no need to search for analogies where, as in the Title IX milieu, the controlling statutes and regulations are clear.'). We conclude that the district court's application of the three-part test does not create a gender-based quota and is consistent with Title IX, 34 C.F.R. § 106.41, the Policy Interpretation, and the mandates of Cohen II.

Finally, plaintiffs argue that, even if defendants could point to discrimination against females at CSUB, eliminating males to satisfy "gender proportionality requirements" is an impermissible remedy. In so arguing, plaintiffs refer the court to Johnson v. Transportation Agency, 480 U.S. 616 (1987) and Steelworkers v. Weber, 443 U.S. 193 (1979).

In Weber, the Supreme Court held that a corporation's voluntary affirmative action plan, granting preference to black employees over more senior while employees in admission to in-plant craft training programs, did not violate Title VII. In Johnson, relying on Weber. the Supreme Court held that the consideration of the sex of a female county employee as one factor in promoting her over an equally qualified male employee under a voluntary affirmative action plan did not violate Title VII. In Weber, the Supreme Court identified four features of the challenged affirmative action plan from which it concluded that Title VII was not violated. These four features are stated in La Riviere v. Ecrual Employment Opportunity Com'n. 683 F.2d 1275, 1279" 12-89 (9th Cir. 1982): (1) that the plan was designed to break down old patterns of racial

segregation and hierarchy'; (2) that the plan did not 'unnecessarily trammel the interests of the white employees' by requiring their discharge and replacement with new black hires; (3) that the plan did not 'create an absolute bar to the advancement of white employees'; and (4) that the plan was 'a temporary measure . . . not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance.'

Plaintiffs argue that defendants' squad size plan to reduce male athletes does not satisfy any of these tests:

It trammels' the interests of males and presents an absolute bar' to their advancement as athletes by excluding them from teams they could and would be on if the teams were allowed to have their previous, typical squad sizes. This 'trammeling is unnecessary' because it does nothing to increase athletic opportunities or participation for females at CSUB. It simply helps satisfy a quota. And the plan has no time limit - in effect, it would indefinitely force CSUB to maintain gender proportionality. Although the Consent Decree has a time limit, the OCR three-part test does not, and defendants have made clear their intention of maintaining the squad size limits in accordance with the OCR's current interpretation of Title IX.

As noted, the cases relied upon by plaintiffs in making this argument involved review of voluntary affirmative action plans under Title VII. In Cohen v. Brown University, supra, 101 F.3d at 170-172, the First Circuit held in pertinent part:

Brown's talismanic incantation of 1 affirmative action' has no legal application to this case and is not helpful to Brown's cause. While 'affirmative action' may have different connotations as a matter of politicts, as matter of law, tis meaning is more circumscribed. True affirmative action cases have historically involved a voluntary undertaking to remedy discrimination (as in a program implemented by a governmental body, or by a private employer or institution) by means of specific group-based preferences or numerical goals, and a specific timetable for those goals [citing among other cases, Weber and Johnson].

Title IX is not an affirmative action statute; it is an anti-discrimination statute, modeled explicitly after another anti-

discrimination statute. Title VI. No aspect of the Title IX regime at issue in this case - inclusive of the statute, the relevant regulation, and the pertinent agency documents - mandates gender-based preferences or quotas, or specific timetables for implementing numerical goals.

Like other anti-discrimination statutory schemes, the Title IX regime permits affirmative action. In addition. Title IX, like other anti-discrimination schemes, permits an inference that a significant gender-based statistical disparity may indicate the existence of discrimination. Consistent with the school desegregation cases, the question of substantial proportionality under the Policy Interpretation's three-part test is merely a starting point for analysis, rather than the conclusion; a rebuttable presumption, rather than an inflexible requirement ... In short, the substantial proportionality test is but one aspect of the inquiry into whether an institution's athletic program complies with Title IX.

Also consistent with the school desegregation cases, the substantial proportionality test of prong one is applied under the Title IX framework, not mechanically, but case-by-case, in a fact specific manner. As with other anti-discrimination regimes, Title IX neither mandates a finding of discrimination based solely upon a gender-based statistical disparity ..., nor prohibits gender-conscious remedial measures ...

Another important distinction between this case and affirmative action cases is that the district court's remedy requiring Brown to accommodate fully and effectively the athletics interests and abilities of its women students does not raise the concerns underlying the Supreme Court's requirement of a particularized factual predicate to justify voluntary affirmative action plans. In reviewing equal protection challenges to such plans/the Court is concerned that government bodies are reaching out to implement race- or gender-conscious remedial measures that are 'ageless in their reach into the past, and timeless in their ability to affect the future,' ... on the basis of facts insufficient to support a prima facie case of a constitutional or statutory violation ... to the benefit of unidentified victims of past discrimination ... Accordingly, the Court has taken the position that voluntary affirmative action plans cannot be constitutionally justified absent a particularized factual predicate

demonstrating the existence of 'identified discrimination,' ... because '[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy,'...

From a constitutional standpoint, the case before us is altogether different. Here, gender-conscious relief was ordered by an Article III court, constitutionally compelled to have before it litigants with standing to raise the cause of action alleged; for the purpose of providing relief upon a duly adjudicated determination that specific defendants had discriminated against a certified class of women in violation of a federal anti-discrimination statute; based upon findings of fact that were subject to the Federal Rules of Evidence. The factual problem presented in affirmative action cases is, 'Does the evidence support a finding of discrimination such that race- or gender-conscious remedial measures are appropriate?' We find these multiple indicia of reliability and specificity to be sufficient to answer that question in the affirmative.

From the mere fact that a remedy flowing from a judicial determination of discrimination is gender-conscious, it does not follow that the remedy constitutes 'affirmative action.' Nor does a 'reverse discrimination^ claim arise every time an anti-discrimination statute is enforced. While some gender-conscious relief may adversely impact one gender - a fact that has not been demonstrated in this case - that alone would not make the relief 'affirmative action' or the consequence of that relief ^reverse discrimination.' To the contrary, race- and gender-conscious remedies are both appropriate and constitutionally permissible under a federal anti-discrimination regime, although such remedial measures are still subject to equal protection review.

While this holding from Cohen v. Brown University is not specifically dispositive, it is an indication of the analytical difficulty in a wholesale importation of standards applicable to a review of one type of Title VII claim to a Title IX claim. And as discussed supra, plaintiffs' basic premises in this portion of its motion are flawed or backwards. Therefore, the court denies summary judgment for plaintiffs to the extent that they seek summary judgment that reduction of Male Athletes at

CSUB to Create Gender Proportionality is Contrary to Supreme Court Precedent under Title VI and Title VII.

III. Constitution Problems with Defendants' Interpretation of Title IX.

Plaintiff further argues in support of their motion for summary judgment that the gender proportionality requirements in effect at CSUB fail the Supreme Court's tests for gender classification because there is no "exceedingly persuasive justification" or "important governmental objective" served by eliminating male athletes at CSUB to satisfy an artificial gender ratio. Even if the purpose of the cap is to increase opportunity or participation for women in_athletics, that purpose, plaintiffs contend, is not "substantially related" to that purpose. In so arguing, plaintiffs refer the court to United States v. Virginia, 518 U.S. 515 (1996) and Adarand Contractors, Inc. v. Pena. 515 H U.S 200 (1995), among other cases.

Plaintiffs are merely recycling arguments made to the Ninth al Circuit and rejected by the Ninth Circuit in Neal. The Ninth Circuit holds in Neal in pertinent part:

The First and Seventh Circuits both have considered at length the constitutionality of the first prong of the OCR's test. In Cohen I ...; Cohen II ...; and Kellev ..., the courts emphatically rejected the claim that the Policy Interpretation was unconstitutional under the Fourteenth Amendment. The separate reasoning in the two Cohen opinions is particularly well-developed. It applied intermediate scrutiny, which we would also do were we addressing the constitutional merits. See Coalition for Econ. Equity v. Wilson, 122 F.3d 692, 702 (9th Cir. 1997)('When the government classifies by gender, it must demonstrate that the classification is substantially related to an important governmental interest, requiring an "exceedingly persuasive" justification.'). Cohen II noted that the Policy Interpretation further the 'clearly important' objectives of avoid[ing] the use of federal resources to support discriminatory practices, and provid[ing] individual citizens effective protection against Chose practices.7 ... Moreover, it found that 'judicial enforcement of federal anti-discrimination statutes is at least an important governmental objective.' ... And Cohen II held that the district court's relief, which was

essentially identical to what the OCR Policy Interpretation calls for, was 'clearly substantially related' objectives ... Along the same lines, the Seventh Circuit has held that 'the remedial scheme established by Title IX and the applicable regulation and policy interpretation are clearly substantially related to' the objective of prohibiting educational institutions from discriminating on the basis of sex.' ... We adopt the reasoning of Cohen I, Cohen II, and Kelley, and hold that the constitutional analysis contained therein persuasively disposes of any serious constitutional concerns that might be raised in relation of the OCR Policy Interpretation.8 The district court's final basis for rejecting the OCR's interpretation of Title IX was therefore erroneous.

8 - The amicus brief filed by USA Wrestling and a number of other organizations repeatedly invokes the Adarand Constructors v, Pena, 515 U.S. 200 ... (1995) line of cases and Title VII precedents to suggest the scope of remedial action to correct for disparities among groups is quite limited. Those precedents are not relevant in the context of collegiate athletics. Unlike most employment settings, athletic teams are gender segregated, and universities must decide before hand how many athletic opportunities they will allocate to each sex. As a result, determining whether discrimination exists in athletic programs requires gender-conscious, group-wide comparisons. Because men are not ""qualified' for women's teams (and vice versa), athletics require a gender conscious allocation of opportunities in the first instance. The paradigm that has motivated the Supreme Court's more recent reverse-discrimination jurisprudence simply does not fit the case at bar. See Cohen II ... (' [W]hile Adarand does make new law, the law it makes is wholly irrelevant to the disposition of this appeal ...').

198 F.3d at 772-773.

Therefore, this ground for summary judgment for plaintiffs is foreclosed by the Ninth Circuit's legal conclusion in Neal.

IV. Impact of Present Factual Record on Ninth Circuit's Opinion.

The Ninth Circuit cautions that its review of factual findings is limited to the record then before the district court in connection with a preliminary injunction and that its determination whether those factual findings are clearly erroneous upon review in connection with a permanent injunction. See Sports Form, Inc. v. United Press Intern., Inc., 686 F.2d 750, 752-753 (9th Cir. 1982).

Plaintiffs contend that the Ninth Circuit's reversal of the preliminary injunction in Neal was based on three grounds: (1) CSUB's elimination of male athletes is allowed under Title IX as a "remedial measure"; (2) requiring schools to equally accommodate the interests of both males and females would freeze, and possibly reverse, increases in women's participation in college athletics; and (3) the district court should defer to the OCR's interpretation of Title IX. Plaintiffs assert that the first two grounds for reversal are factual. The third ground is stated to present a mixed question of law and fact and that "certain facts can and should affect the District Court's reliance on OCR's interpretation." Plaintiffs contend that the factual record now before the court is "vastly more developed" and addresses the bases of the Ninth Circuit's ruling as follows:

First, it is undisputed that CSUB's varsity athletic program has not discriminated against females at any time relevant to this lawsuit. On the contrary, CSUB provides far greater athletic opportunity to females than to males. This is also true throughout t-he CSU system and the United States. Second, women's participation in athletics and other fields can and has increased dramatically without gender proportionality replacing interest in the determination of participation. Third, the discovery done since the Ninth Circuit's ruling shows that OCR's three-part test for Title IX compliance is entitled to no deference in the courts.

A. No Discrimination Against Females in CSUB's Athletic Program to Remedy.

In arguing that there is no discrimination against females in CSUB's athletic program to remedy since the Consent Decree was issued,3 plaintiffs assert that CSUB has added four women's teams (none of which are capped) and one men's

team, (capped at 7 members), and women's teams are given more scholarship money and bigger operating budgets. Plaintiffs assert that women now have 9 varsity teams while males have 6 and that female participants outnumber males by more than 50%. Plaintiffs note that defendants have stipulated that CSUB "is not aware of any written or verbal complaints or allegations lodged, filed or otherwise submitted to CSUB alleging that females have had less opportunity than males to participate in intercollegiate athletics at CSUB or that0 female intercollegiate athletes have received inferior coaching, equipment or facilities at CSUB, or have otherwise been discriminated against at CSUB in intercollegiate athletic programs." Therefore, plaintiffs argue, there is no discrimination against females at CSUB that would be remedied by eliminating male athletes. Plaintiffs further argue that "the

3 - Plaintiffs also argue that before the Consent Decree was issued, CSUB had an equal number of male and female teams and CSUB discounted males' interests in favor of females' interests when adding or dropping athletic teams and that CSUB represented that its athletic program was equitable for females in reports submitted to the California legislature in 1990 and 1993. The court concludes that events preceding the Consent Decree are not relevant to the resolution of these motions and, as discussed above, the court rules that judicial estoppel is inapplicable.

mere fact that CSUB's athletic program has not been gender-proportional to its student body cannot in and of itself .be discrimination." In so asserting, plaintiffs note that Section 1681 (a) prohibits all gender discrimination at federally funded institutions but further states that gender proportionality is not required. From these provisions, plaintiffs argue:

Absence of proportionality could therefore be allowed under § 1681(b). It follows as a matter of simple logic that lack of proportionality does not equal discrimination. If it did, absence of proportionality would be prohibited, since 1681(a) prohibits all discrimination. Stated another way, it lack of proportionality alone means discrimination, then proportionality would be required, since § 1681 (a) prohibits alt gender discrimination.

But § 1681 (b) clearly states that proportionality is not required. Again, lack of proportionality alone therefore cannot equal discrimination.

Defendants do not concede that evidence supports these assertions but argue, even if the evidence did support them, plaintiffs misapprehend how the Three-Part Test operates. Plaintiffs contend that the Three-Part Test is "remedial" and, therefore, can be applied only after there has been individualized discrimination to remedy. Defendants argue that the Three-Part Test is not a remedial measure and requires no finding of discrimination. Rather, defendants contend, the Three-Part Test is a benchmark to assess compliance with Title IX, citing Neal: "[The Three-Part Test] is used to assess whether a school's athletic program is in compliance with Title IX. A university^ athletic program is Title IX-compliant if it

proportionality is (supposedly) a 'remedy' and is preferential treatment for females."

In so arguing, plaintiffs refer to Supreme Court cases holding that preferential treatment for one group is not permitted absent a showing of particularized discrimination against that group, citing City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493, 498-499, 505-511 (1989); Wyqant v. Jackson Board of Education, 476 U.S. 267, 274-276 (1986); Regents of the University of California v. Bakke. 438 U.S. 265, 300-302 (1978). Plaintiffs contend that the Three-Part Test inevitably leads to preferential treatment:

A school must satisfy one of the three parts of the Test, or OCR will find the school in violation of 34 CFR § 106 .41 (c) (1). Part One of the test (proportionality) is necessarily preferential treatment for the sex with the lower Interest rate. 'Part'Two and Three also give preferential treatment in that they focus on the interests of only one sex. Of course, under Part Two a school could add teams for females and still not be providing preferential treatment - for example, if the school had ten athletic teams for males and no teams for females, despite significant athletic interest at the school among females. Adding some teams for females in this situation would not be 'preferential treatment' - it truly would be remedying a situation

of unequal opportunity. But in this example it is not unequal accommodation of interest - simply the absence of proportionality - that establishes unequal opportunity. In contrast, under the Three-Part Test, if a school is not in proportion, it must either show a history and continuing practice of adding women's teams, or it must satisfy all of the interests of females, in order to be found in compliance under Title IX. The absence of proportionality thus establishes a presumption of discrimination when then requires actions to provide greater opportunity for females.

The Supreme Court cases cited above upon which plaintiffs rely to support this contention are voluntary affirmative action cases. As was discussed supra, Cohen v. Brown University, id., 101 F.3d at 170-172, held that the Title IX is not an affirmative action statute. Therefore, the cases upon which plaintiffs rely in making this argument are not on point. Therefore, the court denies this ground for summary judgment asserted by plaintiffs.

B. Women Have Significantly More Athletic Opportunity Than Men Throughout the CSU System and the Country. Plaintiffs further argue that they are entitled to summary judgment because evidence submitted by plaintiffs show that females have significantly more athletic opportunity than males throughout the CSU system and in colleges throughout the "United States. Plaintiffs assert that male athletic participation "has been decimated by the Consent Decree gender ratio requirements."

The issue in this litigation, however, is what is or is not happening at CSUB, not what may or may not be happening at other CSU campuses or at other universities across the United States. Therefore, the court disregards this ground in denying summary judgment for plaintiffs.

C. Women's Part ici-pat ion Can and Has Increased Dramaticallv under Interest-Based Rules Instead of Quotas.

Asserting that Neal expressed concern that requiring schools to accommodate the interests and abilities of both sexes equally ... would result in a freezing of women's participation in college athletics, plaintiffs contend that the evidence before the

court shows definitively that women's participation has increased dramatically without gender ratio requirements. In so arguing, plaintiffs refer to evidence that female participation in high school athletics started increasing in the 1970s before the enactment of Title IX and the issuance of the Three-Part Test and that female representation in law and medicine has increased over the past several decades. Plaintiffs argue:

There is also no reason to believe that colleges and universities will not continue to change their athletic offerings - as they do in all programs - as the interests and abilities of their students change. If programs at educational institutions were somehow frozen forever based on interest at a particular time, women would still be a small minority on college campuses; there would be no computer science program; and students would still be learning Latin. Educational institutions are perfectly capable of adapting to changing interests and demands.

As for women's participation in athletics at CSUB, if defendants" removed their gender proportionality requirement today, females' athletic participation could still rise, simply by filling the existing women's teams.

The record shows that CSUB's female teams frequently had fewer members than they could carry, and have frequently fallen short of their requested minimum squad sizes.

This argument is foreclosed by the Ninth Circuit's ruling in Neal and is therefore denied.

V. Judicial Deference to OCR's Three-Part Test.

Plaintiffs argue that the current record establishes that the court should not defer to OCR's interpretation of Title IX as set forth in the Policy Interpretation, i.e., the Three-Part Test.

However, the Ninth Circuit in Neal reversed the preliminary injunction in part because the district court failed to defer properly to the interpretation of Title IX put forward by the administrative agency that is explicitly authorized to enforce its provisions. It is well-established that the federal courts are to defer substantially to an agency' s interpretation of its own regulations. See Martin v. Occupational Safety & Health

Review Comm'n, 499 U.S. 144, 150 (1991). The Department of Education, 'acting through its OCR [is] the administrative agency charged with administering Title IX. In this instance. Congress explicitly delegated to the agency the task of prescribing the standards for athletic programs under Title IX ... Under Chevron, where Congress has explicitly delegated to an agency the power .±.0 'elucidate a specific provision of the statute by regulation,' that agency's regulations should be accorded 'controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.' Chevron USA v. NRDC,_467 U.S 837, 843-44 ... (1984).

Appellees deem Chevron inapplicable on the ground that OCR's interpretation violates the plain meaning of the statute. Under their interpretation. Title IX bars universities from disadvantaging any student athlete on the basis of his or her gender. But the plain meaning of the nondiscrimination principle set forth in 20 U.S.C. § 1681(a) does not bar remedial actions designed to achieve substantial proportionality between athletic rosters and student bodies. Indeed, Appellees' interpretation of 20 U.S.C. § 1681(a)'s plain meaning would render 1681(b) superfluous. After all/ § 1681(b) states that Title IX does not require any education institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community 7

If § 1681(a) already bars the type of remedial action that Appellant engaged in pursuant to the consent decree, then § 1681(b)'s provision that Title IX does not require such remedial action would be mere surplusage. .... Moreover, we deem it highly instructive that, at oral argument. Appellees conceded that their proposed interpretation of Title IX, whereby a university could permissibly discriminate on the basis of sex in order to ensure that each gender^s interests in atnletic participation were equally accommodated, is just as contrary to 1681 (a) 's purported plain meaning as the interpretation advanced by OCR and Appellants is. We also note that Appellees' interpretation of Title IX's test has been

rejected by explicitly by the Seventh Circuit ..., as well as the OCR, and implicitly rejected by the other circuits that have held that a school may cut the number of male athletic slots in order to bring itself into compliance with Title IX ... Under such circumstances, it is clear that OCR's interpretation of Title IX7s athletics provisions merits deference under Martin and Chevron. In Cohen II and Kellev the courts held that 34 C.F.R. § 106.41 deserved controlling weight under Chevron and that the OCR Policy Interpretation deserved substantial deference under Martin ... Similarly, in the case before us, the 1996 OCR Clarification and the Cantu letter explaining it merit deference under Martin. These clarifications essentially adopted the reasoning of Cohen I as OCR policy. Under these clarifications' clear wording, an institution in which male athletes are overrepresented can bring itself into Title IX compliance by reducing sufficiently the number of roster spots available to men. 198 F.3d at 770-771.

Plaintiffs nonetheless argue that the Policy Interpretation which sets forth the Three-Part Test is not binding on the courts and is not entitled to deference.

While, as the Ninth Circuit noted in Neal, the Policy Interpretation does not have the force and effect of law, "[i]t is well established 'that an agency's construction of its own regulations is entitled to substantial deference.' ..." Martin v. OSHRCU, 499 U.S. 144, 150 (1991). As the Supreme Court explained in Martin:

In situations in which 'the meaning of [regulatory] language is not free from doubt,' the reviewing court should give effect to the agency's interpretation so long as it is 'reasonable,' ... that is, so long-as the interpretation 'sensibly conforms to the purposes and wording of the regulations,' ... Because applying an agency's regulation to complex or changing circumstances calls upon an agency's unique expertise and policymaking prerogatives, we presume that the power authoritatively to interpret its own regulations is a component of the agency7 s delegated law-making powers .

Id., 499 U.S. at 150-151. In Stinson v. United States, 508 U.S. 36, 45 (1993), the Supreme Court reiterated:

As we have often stated, provided an agency's interpretation of its own regulations does not violate the Constitution or a federal statute, it must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.' ...

In Thomas Jefferson Univ. v. Shalala. 512 U.S. 504, 512 (1994), the Supreme Court again explains:

We must give substantial deference to an agency's interpretation of its own regulations ... Our task is not to decide which among several competing interpretations best serves the regulatory purpose. Rather, the agency's interpretation must be given '"control ling weight unless it is plainly erroneous or inconsistent with the regulation."' ... In other words, we must defer to the Secretary's interpretation unless an 'alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation.' ... This broad deference is all the more warranted when ... the regulation concerns 'a complex and highly technical regulatory program,' in which the identification and classification of relevant 'criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns.' ...

In arguing that the Policy Interpretation is not entitled to the deference set forth in these Supreme Court cases, plaintiff contends that the Three-Part Test forces universities to either attain gender proportionality, move steadily toward it, or satisfy all athletic interests of female students.

Plaintiffs argue that "for all practical purposes, part two [of the Three-Part Test] is simply a way of temporarily complying so long as the school is steadily advancing toward proportionality." Plaintiffs further contend that part three is shown by OCR documents to be "nearly impossible to satisfy" because to do so, "a school must satisfy all the athletic interests and abilities of females - including prospective students". Plaintiffs argue that, because interests change, a school attempting to comply with part three faces constant uncertainty and the threat of litigation. They further argue that a university attempting to comply under part three will have to favor females' interests to a much greater degree than that o males, so long as the males' interest rate is higher than the females'

interest rate and that a school must ignore the relative interest rates of the genders in order to satisfy part three of the test. Plaintiffs contend that, because of the difficulties in attaining proportionality in light of the disparities in athletic interest rates between males and females, many schools are eliminating male athletes to help create proportionality.

The court does not see the need to determine in this litigation if parts two or three of the Three-Part Test are entitled to substantial deference. CSUB is acting pursuant to the Consent Decree which is based on part one of the Three-Part Test. Because part one of the Three-Part Test is entitled to substantial deference and that is the part with respect to which CSUB proceeded, the court being asked to make an advisory opinion about the legality of the other two parts.

Plaintiffs further argue that requiring "gender proportionality" between athletic programs and the student body is inconsistent with Title IX's regulations because the regulations require schools to consider the interests and abilities of students when designing their athletic programs. Again, this argument is foreclosed by the Ninth Circuit's opinion in Neal.

Plaintiffs further argue that the Three-Part Test, as clarified in 1996, leads to a violation of the regulations, rather than compliance with the regulations:

Because each part of the three-part test, as well as its overall operation, requires schools to ignore male interests and favor those of females, it cannot bring about equal accommodation of the interests and abilities of both sexes, as the regulations require. Compliance with any part of the Three-Part Test ensures unequal accommodation of interests, as long as male and female interest rates are different. Since this is the typical situation, and has been for many years, the Three-Part test appears likely to result in long term, pervasive discrimination against males in college athletic programs. The OCR investigative documents are replete with examples where females' interest appears to be accommodated to a higher degree than males at the start of an investigation; yet the school is found not to have satisfied any part of the Three-Part Test and is therefore found in violation of 34 CFR 106.41(c^ (1). See, OCR Investigative Documents, Exhs. 49-169.

Plaintiffs argue that OCR's current interpretation of Title IX, particularly as clarified in 1996, is inconsistent with its previous longstanding interpretation because "it strongly emphasizes proportionality as a standard of compliance; it presumes discrimination absent proportionality; it assumes equal interest rates among males and females". Therefore, plaintiffs contend, the current interpretation is not entitled to deference because it is inconsistent with the regulation.

Again, this argument is foreclosed by the Ninth Circuit's opinion in Neal and by the First Circuit's decision in Cohen v. Brown University. 101 F.3d 155, 172-173 (1st Cir. 1996), cited by Neal with approval.

Plaintiff further argues that the Three-Part Test not entitled to substantial deference because it is arbitrary and irrational in that it "improperly assumes that athletic interest levels of males and females are always and everywhere equal", because "it is based on an absurd definition of 'opportunity'", and because "no one need actually be harmed, or even believe they themselves are harmed or discriminated against, for OCR to investigate a school and apply its Three-Part test to the school's athletic program.

Again, these arguments are foreclosed by Neal and by Cohen. Therefore, summary judgment for plaintiffs on this ground is denied.

VI. Exclusion of Wrestlers at CSUB in Order to Create Gender Proportionality Harms Plaintiffs and Three-Part Test is Bad Policy.

Plaintiffs argue that excluding wrestlers from the CSUB wrestling teams harms those excluded by keeping them from doing an activity that is important to them, because denial of constitutional rights constitutes sufficient harm to warrant an injunction, and by reducing participation and competitiveness in the sport of collegiate wrestling. Finally, plaintiffs argue that "[r]equiring gender proportionality and extreme favoritism toward females, particularly through exclusion of males" is bad policy because "it ignores differences in expressed interests in males and females", "it has caused and will continue to cause

disruption in collegiate athletic programs of schools eliminate male teams to create proportion [sic]" and, "it will take young males off the playing field, where they are less likely to contribute to juvenile crime, which is substantially higher among males than females."

The court concludes that these arguments are irrelevant and does not consider them in resolving plaintiffs' motion for summary judgment.

Accordingly, plaintiffs' motion for summary judgment is denied.

E. Defendants' Motion for Summary Judgment.

In moving for summary judgment in connection with plaintiffs' Title IX claim, defendants rely on Neal;

The instant case requires us to consider whether Title IX prevents a university in which male students occupy a disproportionately high percentage of athletic roster spots from making gender-conscious decisions to reduce the proportion of roster spots assigned to men. We hold that Title IX does not bar such remedial actions.

Every court, in construing the Policy Interpretation and the text of Title IX, has held that a university may bring itself into Title IX compliance by increasing athletic opportunities for the underrepresented gender (women in this case) or by decreasing athletic opportunities for the overrepresented gender (men in this case).

198 F.3d at 765, 769-770.

Plaintiffs oppose defendants' motion for summary judgment by reiterating the arguments made in support of their motion for summary judgment. Because the court has denied plaintiffs' motion for summary judgment based on these arguments, the court grants defendants' motion for summary judgment.

ACCORDINGLY, IT IS ORDERED that plaintiffs' motion for summary judgment is denied and that defendants' motion for summary judgment is granted.

JUDGMENT FOR DEFENDANTS TO BE ENTERED.
Dated: Sept 24, 2001

ROBERT E. COYLE
UNITED STATES DISTRICT JUDGE

EASTERN DISTRICT OF CALIFORNIA

NEAL vs. BOARD OF TRUSTEES

JUDGMENT IN A CIVIL ACTION
CV-F-97-5009 REC/SMS

DECISION BY COURT: This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that JUDGMENT IS ENTERED for Defendants and against Plaintiffs

Dated: 9-26-01

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
NEAL v. BOARD OF TRUSTEES
No. 01-17390
D.C. No. CV-97-05009-REC(SMS)
MEMORANDUM*

Appeal from the United States District Court for the Eastern District of California Robert E. Coyle, Chief Judge, Presiding
Submitted November 20,2002
Pasadena, California

Before: CANBY, HALL, and GRABER, Circuit Judges.

This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3. This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Appellants, Stephen Neal and other members of the California State University, Bakersfield (CSUB) Wrestling Team, appeal a grant of summary judgment in favor of appellees. The district court held that appellees' practice of reducing roster spots in male athletics in order to foster proportionality between men's and women's intercollegiate athletic teams does not violate Title DC or the Equal Protection Clause of the Federal Constitution.

I.

We previously considered an appeal from a preliminary injunction in this case. See Neal v. Board of Trustees. 198 F.3d 763 (9th Cir. 1999). Appellants essentially ask us to disregard our interpretation of Title DC in that opinion because the law of the case doctrine "should not be applied woodenly when doing so would be inconsistent with considerations of substantial justice." We are not persuaded that our previous interpretation of Title DC is inconsistent with considerations of substantial justice. Furthermore, the interpretation of Title DC announced in Neal is not only the law of the case. It is the law of this circuit and is therefore binding on all courts in this circuit. See Wolfson v. Watts fin re Watts). 298 F.3d 1077, 1083-84 (9th Cir. 2002) (O'Scannlain, J. concurring) ("It is a bedrock principle of our court that the published decision of one three-judge panel binds every other panel, from that day forward."). Unless and until Congress changes the statute, or the Supreme Court of the United States or an en bane panel of this court interprets Title IX differently, we are bound by our interpretation of Title IX announced in Neal. While the factual record may now be more fully developed, this does not affect our purely legal interpretations of Title
IX and the Equal Protection Clause.

II

Appellants claim that the district court should have allowed discovery into the interests of males and females in

participating in intercollegiate athletics. Such discovery is not at all relevant to the question of whether or not appellees violated Title IX. See NeaL 198 F.3d at 769. The district court did not abuse its discretion by refusing this discovery.

III.

Summary judgment was appropriately granted in favor of appellees. The district court correctly applied our opinion in Neal and we AFFIRM for the reasons stated in Judge Coyle's September 24, 2001, summary judgment order.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
NEAL v. BOARD OF
No. 01-17390 D.C. No.
CV-97-05009-REC(SMS) Eastern District of California, Fresno

ORDER

Before: CANBY, HALL, and GRABER, Circuit Judges

The panel has voted to deny appellant's petition for rehearing en bane. The full court has been advised of the petition for rehearing en bane and no judge has requested a vote on whether to rehear the matter en bane. Fed. R. App. P. 35.

The petition for rehearing en bane is DENIED.

The court will accept no further filings in this case.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APPEAL FROM the United States District Court for the Eastern'District of California (Fresno).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of California (Fresno) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered: 11/26/02

UNITED STATES CONSTITUTION
FOURTEENTH AMENDMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

20 U.S.C. §1681

(a) Prohibition against discrimination; exceptions

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, ...

***

(b) Preferential or disparate treatment because of imbalance in participation or receipt of Federal benefits; statistical evidence of imbalance

Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage

of persons of that sex in any community, State, section, or other area: *Provided,* That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter or statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

***

20 U.S.C. §1682
Federal Administrative Enforcement; report to Congressional Committees

Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President.

***

34 CODE OF FEDERAL REGULATIONS
PART 106
Nondiscrimination On The Basis Of Sex In Education Programs And Activities Receiving Or Benefiting From Federal Financial Assistance

***

Subpart D-Discrimination on the basis of Sex in Education Programs and Activities Prohibited

§106.31 Education programs and activities.

***

(b) *Specific prohibitions.* Except as provided in this subpart,in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sec:

(1) Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;

(2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;

(3) Deny any person any such aid, benefit, or service;

(4) Subject any person to separate or different rules of behavior, sanctions, or other treatment;

(5) Discriminate against any person in the application of any rules of appearance;

(6) Apply any rule concerning the domicile or residence of a student or applicant, including eligibility for instate fees and tuition;

(7) Aid or perpetuate discrimination against any person by providing significant assistance to any agency, or ganization, or person which discriminates or the basis of sex in providing any aid, benefit or service to students or employees;

***

§106.41 Athletics.

***

(c) *Equal opportunity.* A recipient which oerates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic oportunity for members of both sexes. in determining whether equal opportunities are available the Director will consider, among other factors:

(1) Whether the selction of sorts and levels of competition effectively accommodate the interests and abilities of members of both sexes;

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Mr. DOMINICK. Just to give me some feel about this, what does the Senator do about institutions that feel they operate much better, let us say if they have a ratio of 60 percent men and 40 percent girls, and they want to keep that ratio within their student bodies? How does the amendment deal with the kind of situation where we suddenly find that women want to go into that collegebecause it si made up of 60 percent men students? They apply to enter the school and their applications are perfectly all right, and then it gets to the 40 percent level. What is to be done then?

Mr. BAYH. Will the senator define what he means when he says that they feel an institution operates best that way? How does he decide that?

Mr. DOMINICK. I am talking about the institutions themselves. There are a number of colleges and universities around the country which, I think, definitely try to keep a certain quota or a certain ratio as between male and female students, and they feel that their own university, wherever it

may be or whatever it may be emphasizing, would provide better educational opportunities, in the broad sense of the word, if it kept that ratio than it would if it had different mix.

Mr. BAYH. With all respect to the Senator from Colorado, that is the very thing this amendment is trying to prohibit.

Mr. DOMINICK. That is what I wondered about.

Mr. BAYH. That is exactly what this amendment inteds to prohibit. It is well and good to say that an institution makes a determination that it operates better with a 60-40 percent ratio of men to women, but what happens if that institution makes the determination that the ratio should be 10 to 1? That is what happens in the medical schools, for example. It is the purpose that those schools should be open to all students on the basis of merit, without the question of sex bein involved.

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Mr. BAYH. The amendment does not contain, nor does the Senator from Indiana feel it should contain, a quota which says there has to be a 50-50 ratio to meet the test.

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p. 30409

Mr. GURNEY. I think we may find places where it ought to apply. Some institutions may have a ratio no of 90-10 where they do favor males in place of females, and maintain their constant ratio, where perhaps it ought to be broadened. Does the bill do anything for that?

***

Mr. BAYH. The amendment is not designed to require specific quotas. The bill is designed to deal with the specific example to which the Senator from Florida referred. I do not see how a 90-10 ratio has any relevance. The basis for determining compliance would not be an arbitrary ratio but the qualifications of the students who have made application. That would be the question-how many qualified men students were

admitted and whether the institution required significantly higher standards for women students.

Mr. GURNEY. I do not argue with that I am for the proposal. I agree with it. I want to make sure that it does cover that.

Mr. BAYH. That is what it is designed for.

***

Mr. BYRD. of Virginia. In colloquy with the distinguished Senator from Florida, I understood the Senator from Indiana to say that the ratio in those colleges that now have a ratio of 90 to 10 is not enough and that it should be a different ratio. Is that not a quota system, so to speak?

Mr. BAYH. No. What we are saying is that we are striking down quotas. The thrust of the amendment is to do away with every quota. If there is an institution that has 90-percent men and 10-percent women, or vice versa, and if examination has shown that the ratio of the sexes is not based upon the objective qualifications of the students, this sanction may be applied. We are dealing ehre with a fact of life, that in most institutions of higher learning a woman, to be admitted must score significantly higher on admission tests. And, even if she scores significantly higher on the tests, she may then be confronted with arbitrary exclusion because the of women for that school has already been filled.

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CONGRESSIONAL RECORD - HOUSE
Volume 117 - Part 30
November 4, 1971

Mrs. GREEN.

***

p. 39251

I want to make it perfectly clear that in title X there is no quota. I am opposed to quotas. I differed with the gentlement from Illinois when we were considering the Equal Employment Opportunity Commission legislation. I am absolutely opposed to the Philadelphia plan. If a college has 5,000 men and 3,000 or 4,000 women in it and if we adopt title X. It does not mean that the college has to bring the number of women up to 5,000. If we do that, then we are engaging in discrimination, also. In that case we would be discriminating against men. All I want and all i ask is that if two individuals, a man and a woman, come to a college or a university and they have equal credentials and apply for admission, that they shall be treated as equals-two individuals without any quota.

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Mrs. MINK

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p. 39252

We do not advocate quotas and certainly we do not insist upon an even split of all college undergraduate enrollments. But just as we insist that schools be color-blind, we must insist also that they be sex-blind as well. Why ask whether Leslie Jones is a boy or girl? Why not consider only the overall qualifications and potential for success as a student, and admit or not admit solely on that basis. This is all that provision of the bill requires-fairness and impartiality. It is ludicrous to even ask whether the applicant is male or female. if we really beliee in equality, we must begin to insist that our isntitutions of higher

learning practice it or not come the Federal Government for financial support.

***

Even if 90 percent of those admitted to science departments were men, there could be no complaint as long as those women who did apply were considered on an equal basis with men. We are not trying to tell the schools who must be in what department, or how many, but only that those who apply must have equal opportunity for admission to the department they seek.

***

p. 39259

Mrs. GREEN of Oregon. This title X will not affect ceilings on institutional enrollments. It has nothing to do with how many students shall be admitted in total.

In terms of a quota, if a school is coeducational, as the gentleman suggested, and has a quota of 3,000 men and 1,500 women, and a woman is discriminated against on the basis of that quota,yes the provisions of this title would affect the admission policy.

As I have said before, I oppose quotas, such as the Philadelphia plan. I believe it would be very wrong for us to establish a quota system in colleges or universities and so say, "Because you have admitted 3,000 men and 1,500 women you are immediately going to have to choose from among your applicants enough so that the group will be 50 percent men and 50 percent women." I would be adamantly opposed to that.

All that this title does is to ask that a woman be considered as a human being, that her qualifications, her high-school work and other qualifications be considered in the same fashion as those of a male applicant. If she qualifies, she should not be discriminated against on the basis of sex, just as we do not now discriminate on the basis of race.

I know that the gentleman from Louisiana realizes in many places they would like to establish a quota on X number of whites and blacks, and so forth. I believe that is wrong. It seems to me that individuals, whether they are white, black, yellow , brown, red or whether they are male or female, ought to be considered on their individual merit and individual talent and whether or not hey can do the work at that university.

***

Mr. WAGGONNER. The net effect, then, would be to prohibit ceilings by sex if the ceiling had been reached for either sex before the other?

Mrs. GREEN of Oregon. The gentleman is correct.

***

Mrs. GREEN of Oregon. If would prohibit quotas now in effect or would prohibit the enactment of a quota system.

***

p. 39261

Mr. QUIE. Mr. Chairman, I offer an amendment.

***

Mr. QUIE. Mr. Chairman, this amendment would provide that there shall be no quotas in this sex antidiscrimination title.

***

p. 39262

The gentlewoman indicated in her remarks in support of title X that she is opposed to quotas. To make it absolutely certain there will not be a requirement of quotas in the graduate institutions and employment in institutions of higher education similar to the prohibition against preferential treatment for minorities under Civil Rights Act I believe this legislation is necessary.

***

Mr. GREEN of Oregon.

***

As I stated before, I am opposed to quotas. I do recall the debate on the EEOC when I asked the gentleman from Minnesota and the gentleman from Illinois if they would accept and amendment which would prohibit any preferential treatment in the EEOC and keep quotas out. the gentlemen would not accept that kind of amendment, and , as I understand it they favor the Philadelphia Plan in industries. To my way of thinking a quota system would hurt our colleges and universities. I am opposed to it even in terms of attempting to end discrimination on the basis of sex.

The CHAIRMAN pro tempore. The question is on the amendment offered by the gentlemen from Minnesota (Mr. QUIE).

The question was taken: and the chairman being in doubt, the committee divided, and there were-ayes 90, noes 1.

So the amendment was agreed to.

***

CONGRESSIONAL RECORD-SENATE
Volume 118 - Part 5
February 28, 1972

p. 5812

Mr. BAYH. this amendment sets no quotas. It only guarantees equality of opportunity. The Senator from Indiana cannot be sure about the sexual balance...

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p. 5813

Mr. BEALL. Mr. President, the minority side is willing to accept the amendment. For myself, I hope it is the intent of the Senate in adopting the amendment that we are desirious of eliminating the sex discrimination that has taken place in education. As we eliminate this , I hope that we are not establishing still another form of bias. I hope that what we are saying is that we want everyone to treated fairly and equally so far as the requirement are concerned. We do not answer that by saying that we want to have the faculty composed 50 percent of women and 50 percent of men.

Mr. BAYH. I appreciate the Senator's bringing out that point. I had said earlier that amendment does not require a 3 percent or a 55 percent balance. It tries to speak direclty in regard to women students who do want access to institutions.

There is no way we can or want to force women to attend and institution they are not capable of attending. Let everyone go to the schools they qualified to attend.

***

EQUAL OPPORTUNITY IN INTERCOLLEGIATE ATHLETICS:
Requirements Under Title Ix Of The Education Amendments Of 1972

U.S. Department of Education Office of Civil Rights

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PROPOSED POLICY INTERPRETATION
Title IX and Intercollegiate Athletics
Department Of Health, Education, And Welfare
Office For Civil Rights
Federal Register, Vol. 43, No. 238

***

4. Equalizing opportunity for men and women in athletics will not result in identical men's and women's athletic programs. Intercollegiate athletic programs that provide equal opportunities for both sexes may offer different sports, and have different participation rates and varying competition opportunities for men and for women, because their interests and abilities may be different. These differences will result in deffirent men's and women's programs that do not violate Title IX.

***

II. Equally Accommodating The Interests And Abilities Of Women

The Title IX regulation does not require and equal number of men and women participants or an equal number of men's and women's sports. Rather, it requires that the interests and abilities of men and women be equally accommodated.

***

POLICY INTERPRETATION
Title IX and Intercollegiate Athletics
Department Of Health, Education, And Welfare
Office for Civil Rights
Federal Register, Vol. 44, No. 239, p. 71413

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IV. Summary of Final Policy Interpretation

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Compliance in Meeting the Interests and Abilities of Male and Female Students: Pursuant to the regulation, the governing principal in this area is that the athletic interests and abiltities of male and female students mus be equally efffectively accommodated.

***

C. Effective Accommodation of Student Interests and Abilities.

***

3. *Application of the Policy-Determination of Athletic Interests and Abilities.*

Institutions may determine the athletic interests and abilities of students by nondiscriminatory methods of their choosing provided:

a. The processes take into account the nationally increasing levels of women's interests and abilities;

***

d. The methods are responsive to the expressed interests fo students capable of intercollegiate competition who are members of an underrepresented sex.

***

CLARIFICATION OF THE THREE-PART TEST
United States Department Of Education
Office For Civil Rights
Jan 16 1996

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The first part of the test--substantial proportionality--focuses on the participation rates of men and women at an instutution and affords an institution a "safe harbor" for establishing that it provides nondiscriminatory participation opportunities.

***

Several parties also suggested that, in determining the number of participation opportunities offered by and institution, OCR count unfilled slots, i.e., those positions on a team that an institution claims the team can support but which are not filled by actual athletes. OCR must, however, count actual athletes because participation opportunities must be real, not illusory.

***

OCR also received comments that indicate that there is still confusion about the elimination and capping of men's teams in the context of Title IX compliance. The rules here are straightforward. An institution can choose to eliminate or cap teams as a way of complying with part one of the three-part test.

***

STIPULATION OF FACTS

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto, by their respective counsel, that, for this action, the facts listed below are undisputed and may be treated by the court as proven facts.

1. After the Consent Decree was issued in October, 1993, CSUB imposed specific squad size limitations to achieve gender proportionality to comply with the Consent Decree and with the Office of Civil Rights Policy Interpretation of Title IX.

2. California State University Bakersfield (:CSUB") is not aware of any written or verbal complaints or allegations lodged, filed or otherwise submitted to CSUB alleging that females have had less opportunity than males to participate in intercollegiate athletics at CSUB or that female intercollegiate athletes have received inferior coaching, equipment or facilities at CSUB, or have otherwise been discriminated against in CSUB intercollegiate athletic programs.

Date: August 25, 2000 Tim J. Emert
Attorney for Defendants

Date: August 30, 2000 Mark Martel
Attorney for Plaintiffs

STIPULATION OF FACTS (2nd SET)

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto, by thier respective counsel, that, for this action, the facts listed below are undisputed and may be treated by the court as proven facts.

3. Although considerations related to safety, finance, pedagogical and educational factors, including the ratio of the athletes to coaches and the capacity of athletic department staff, all affect both the maximum number of athletes that could reasonably be allowed on each of CSUB's varsity athletic teams and the maximum number of total varsity athletes at the school, these considerations did not play a role in setting the specific numerical limits placed on CSUB's male athlethic teams from 1994 to the present.

Dated: October 24, 2000 Tim J. Emert
Attorney for Defendants

Dated: October 24, 2000 Mark Martel
Attorney for Plainitiffs

"OPEN TO ALL"
TITLE IX AT THIRTY
February 28, 2003
The Secretary of Education's Commission on Opportunity in Athletics

***

Finding 2:

Artificial limits on walk-on opportunities do not benefit anyone

Although no statistical analysis of this issue has been performed, there ahs been much testimony about the relative rates at which men and women walk-on to teams. A walk-on athlete is one who participates in a sport without either full or partial scholarship support for their participation. A number of witnesses have told Commissioners that male athletes currently walk-on to teams at greater levels than do females. If has been alleged that this has led institutions to limit the number of men allowed to walk-on to teams, a practice known as a roster management. Roster management may control the appearance of disproportional participation, but it does not create any corresponding benefit for the sex not subject to roster management.

The relative differences in rates at which men and women walk-on to teams has been explained by reference to cultural forces encouraging male sports participation, which are not matched by a corresponding set of forces for women. It has also been suggested that since women are more involved in a number of other extracurricular activities, they may be simply exercising their choices in ways different to those of men. There is a wide consensus, though, that even if the interest of men and women in taking advantage of wal-on opportunities is not the same, no one should be discourage from waling on to teams for artificial reasons.

Artificial reasons may includ: 1) cutting down on the number of opportunities available to one sex in order to ensure compliance with the proportionality part of the three-part test, and 2) avoiding the creation of new opportunities for women by limiting the number of men who can participate.

A situation where one sex loses the opportunity to walk-on to teams where no corresponding benefit to the other sex is gained is not the intent of Title IX enforcement. Limiting walk-ons for reasons other than those related to lack of institutional resources or coaching decisions has serious ramifications for students who are not allowed to participate in athletics. Schools should not impose these kinds of artificial barriers to such participation.

***

PREAMBLE TO TITLE IX REGULATIONS
Federal Register
Vol. 40, No. 108, p. 24128
June 4, 1975

Title 45-Public Welfare

Part 86-Nondiscrimination On The Basis Of Sex In Education Programs And Activities Receiving Or Benefiting From Federal Financial Assistance

***

The Department's intent, however, is to require institutions to take the interests of both sexes into account in determining what sports to offer.

Equal Opportunity In
Intercollegiate Athletics:
Requirements Under Title IX
of the Education Amendments
of 1972

U.S. Department of Education
Office for Civil Rights
Washington, D.C. 20202-1328

INTRODUCTION

Title IX of the Education Amendments of 1972 (20 U.S.C. §1681 et seq.) prohibits discrimination on the basis of sex in education programs receiving Federal financial assistance. Athletics are considered an integral part of an institution's education program and are therefore covered by this law. It is the responsibility of the Department of Education (ED), Office for Civil Rights (OCR), to assure that athletic programs are operated in a manner that is free from discrimination on the basis of sex.

The regulation (34 C.F.R. Part 106) implementing Title IX contains specific provisions relating to athletic opportunities. It also permits individual institutions considerable flexibility in achieving compliance with the law.

To clarify the athletic requirements contained in the Title IX regulation, a Policy Interpretation was issued to provide colleges and universities with more guidance on how to comply with the law. The Policy Interpretation, which explains the standards of the regulation, clarifies the obligations of colleges and universities in three basic areas:

student interests and abilities;

athletic benefits and opportunities; and

financial assistance.

While designed specifically for intercollegiate athletics, the general principles and compliance standards set forth in the. Policy Interpretation will often apply to interscholastic athletic programs operated by elementary and secondary school systems, and T-.o club and intramural athletic programs.

STUDENT INTERESTS AND ABILITIES

The athletic interests and abilities of male and female students must be equally and effectively accommodated. Compliance with this factor is assessed by examining a school's: (a) determination of the athletic interests and abilities of its

students; (b) selection of the sports that are offered; and (c) levels of competition, including opportunity for team competition.

Measuring Athletic Interests

Colleges and universities have discretion in selecting the methods for determining the athletic interests and abilities of their students, as long as those methods are nondiscriminatory. The only requirements imposed are that institutions used methods that:

take into account the nationally increasing level of women's interests and abilities;

do not disadvantage the underrepresented sex (i.e., that sex whose participation rate in athletics is substantially below its enrollment rate);

take into account team performance records of both male and female teams; and

respond to the expressed interests of students capable of intercollegiate competition who belong to the underrepresented sex.

Selection of Sports

A college or university is not required to offer particular sports or the same sports- for- each sex. Also, an institution is not required to offer an equal number of sports for each sex. However, an institution must accommodate to the same degree the athletic interests and abilities of each sex in the selection of sports.

A college or university may sponsor separate teams for men and women where selection is based on competitive skill or when the activity is. a contact sport. Contact sports under the Title IX regulation include boxing, wrestling, rugby, ice hockey, football, basketball and other sports in which the purpose or major activity involves bodily contact.

Equally effective accommodation also requires a college or university that sponsors a team for only one sex to do so for members of the other sex under certain circumstances. This applies to contact and noncontact sports. For example, a separate team may be required if there is sufficient interest and ability among members of the excluded sex Co sustain a team and a reasonable expectation of competition for that team. Also, where an institution sponsors a team in a particular noncontact sport for members of one sex, it must allow athletes of the other sex to try-out for the team if, historically, there have been limited athletic opportunities for members of the other sex.

Levels of Competition

Colleges and universities must provide opportunity for intercollegiate competition as well as team schedules which equally reflect the competitive abilities of male and female athletes. An institution's compliance in this area may be assessed in any one of the following ways:

- the numbers of men and women participating in intercollegiate athletics are substantially proportionate to their overall enrollment; or

- where members of one sex are underrepresented in the athletics program,-whether the institution can show a continuing practice of program expansion responsive to the developing interests and abilities of that sex; or

- the present program accommodates the interests and abilities of the underrepresented sex.

In considering equivalent opportunities for levels of competition, compliance will be assessed by examining whether:

- male and female athletes, in proportion to their participation in athletic programs, are provided equivalently advanced competitive opportunities; or

- the institution has a history and continuing practice' of upgrading the competitive opportunities available to the

historically disadvantaged sex as warranted by the developing abilities among the athletes of that sex

Colleges and universities are not required to develop or upgrade an intercollegiate team if there is no reasonable expectation that competition will be available for that team within the institution's normal competitive region. However, an institution may be required to encourage development of such competition when overall athletic opportunities within that region have been historically limited for the members of one sex.

Discriminatory rules established by a governing athletic organization, or league do not relieve recipients of their Title IX responsibilities. For example, a college or university may not limit the eligibility or participation of women based on policies or requirements imposed by an intercollegiate athletic body.

ATHLETIC BENEFITS AND OPPORTUNITIES

In determining whether equal opportunities in athletics are available, the Title IX regulation specifies the following factors which must be considered

- accommodation of athletic interests and abilities (which is addressed separately in the section above);

- equipment and supplies; scheduling of games and practice time
- travel and per diem allowances;

- opportunity for coaching and academic tutoring;

- assignment and compensation of coaches and tutors;

- locker rooms and other facilities;

- medical and training services;

TITLE IX INTERCOLLEGIATE ATHLETICS
INVESTIGATOR'S MANUAL

CHAPTER SEVEN
ACCOMODATION OF STUDENT INTERESTS AND ABILITIES 34 CFR § 106.10(0(1)

TITLE IX REGULATION AKD POLICY INTERPRETATION

The Title IX regulation requires Institutions to accommodate effectively the interests and abilities of students to the extent necessary to provide equal opportunity in the selection of sports and levels of competition available to both sexes. As used in the regulation and in the Policy Interpretation, "levels of competition" refers to the oportunity to compete in each of the various forms of collegiate - competition e.g., intramural, club, and intercollegiate - while "selection of sports" means type of sport- e.g., basketball, swimming -offered at the intercollegiate level.

The regulation also authorizes the Assistant Secretary to consider other factors in determining whether an institution is providing equal opportunity, and the Policy Interpretation explains that the competitive opportunity available to athletes of both sexes will be considered. As used in the Policy Interpretation, "competitive opportunity'1 refers to the degree of challenge represented by the competitive schedules of intercollegiate teams.

The Policy Interpretation states:

The Department will assess compliance with the interests and abilities section of the regulation by examining the following factors:
a. The determination of athletic interests and abilities of students;

b. The selection of sports offered; and

c. The levels of competition available including the opportunity for team competition.

Thus, the Policy Interpretation explains that equal accommodation of student interests and abilities concerns the kinds of intercollegiate participation opportunities (selection of sports), availability of intercollegiate participation opportunities (levels of competition); and quality of intercollegiate participation opportunities (competitive opportunity) available to students of both sexes. Accordingly, as with other program components, compliance determinations require assessment of the comparative availability, quality, and variety of intercollegiate participation opportunities afforded male and female students. Differences between men's and women's programs are justifiable if they are attributable to demonstrated differences in the interests and abilities of the members of each sex. Generally, disparities in the quality of competition will require explanation only in terms of the interests and abilities of intercollegiate-athletes, while differences in the availability and variety of participation opportunities must be justified by the interests and abilities in the larger student population. |

Title IX does not require institutions to offer the identical sports, a proportional number of intercollegiate participation opportunities. (with respect to the division by sex of the total student enrollment) or the same team competitive opportunities to men and women. Rather, it requires institutions to meet the interests and abilities of women to the sane degree as they meet the interests and abilities of men, by providing opportunities which address the interests and abilities of each sex equally.

Additionally, you should remember that a determination of whether the institution has selected sports and levels of competition to accommodate ate equally effectively the interests and abilities of both sexes, must be considered together with your determination under the other factors (see Chapter six) which the Policy Interpretation directs you to assess in reaching your conclusion on the institution's compliance. (Please refer to Chapter eight for a discussion on the overall assessment of compliance)

a. Equally Effective Accommodation and the Need for Athletic Program Development

As documented in Appendix A to the Policy Interpretation, participation by women in all levels of sports is growing

rapidly. The developing nature of women's athletics at postsecondary education institutions reflects broadening interests in competitive athletics and steadily escalating skills among female students, many of whom are veterans of organized athletic competition at the high school level.

While many institutions have developed their athletic programs fear women to take these changes into account, others have been slow to adjust their programs and consequently have kept intercollegiate participation opportunities for women artificially low, of lesser quality, or of narrower breadth than those provided to men.1/

The Policy Interpretation, explains that "equally effective accommodation" requires that institutions accommodate the interests and abilities of their students in a manner which takes into account any historical, sex-linked disparities, in the availability, quality, and kinds of intercollegiate competitive opportunities. This will usually mean that an institution must at least accommodate the developing interests and abilities of women competitors as it did those of men during the formative years of their program. However, where men's programs were allowed to develop and flourish gradually and women's programs were prohibited or restricted (as was often the case) more accelerated development of the women's programs is warranted to remedy the effects of the past discrimination. Similarly, where new growth for men's programs is now restricted because the program already meets a large number of interests, continued accelerated growth of the women's program will be warranted if it does not meet women's interests and abilities to the same degree that the men's interests and abilities are met.

The Policy Interpretation notes that:

Institutions are rot required to upgrade teams to intercollegiate status or otherwise develop intercollegiate sports absent reasonable expectation that intercollegiate competition in that sport will be available within the institution's normal competitive regions. Institutions nay be required by the Title 3X regulation to actively encourage the development of such competition, however, when overall athletic opportunities

within that region have been historically limited for the members of one sex.

1/ There is also the possibility that similar practices disfavoring men occur en a few campuses. When this is the case your investigation, should, focus en determining whether the overall athletic opportunities available to the men are equivalent to those available to the women.

The thrust here is remedial, not affirmative, and hinges on the existence of present disparities. Unless an institution can demonstrate that lack of movement toward equivalent intercollegiate programs is the consequence of a lack of interest and ability among its women students, it has the obligation to overcome program disparities as rapidly as possible.

b. Availability of Intercollegiate Participation Opportunities (Levels of Competition)

The Policy Interpretation states that:

In effectively accommodating the interests and abilities of male and female athletic, institutions must provide... the opportunity for individuals of each sex to participate in intercollegiate competition...

Compliance will be assessed in any one of the following:

(1) whether intercollegiate level participation oppor- tunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or

(2) where the members of one sex have been and are under-represented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the members of that sex; or

(3) where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and

abilities of the members of that sex have been fully and effectively accommodated by the present program.

With respect to item one above, you will test whether the institution has achieved compliance by calculating whether the numbers of participation opportunities for male and female intercollegiate athletes arc proportional to the numbers of male and female students.

TITLE IX ATHLETICS INVESTIGATOR'S MANUAL
1990

Prepared By:
VALERIE M. BONNETTE
Policy and Enforcement Service

LAMAR DANIEL
Region IV

OFFICE FOR CIVIL RIGHTS
DEPARTMENT OF EDUCATION

EFFECTIVE ACCOMMODATION OF STUDENT INTERESTS AND ABILITIES
34 C.F.R. § 106.41(c)(l).

The Title IX regulation requires institutions that offer athletics programs to accommodate effectively the interests and abilities of students to the extent necessary to provide equal opportunity in the selection of sports and levels of competition available to members of both sexes.

The Policy Interpretation notes several considerations in determining effective accommodation of student interests and abilities. Many of these considerations are addressed below under "Cautions" The basic determination for this program component relies on a two part analysis: in effect, the investigation involves obtaining and analyzing information regarding: 1) equal opportunities to compete. and 2) levels of competition (for intercollegiate athletics, "levels of competition" refers primarily to the quality of competition as

evidenced by whether a team competes against other teams at the same division level and secondarily, team levels such as varsity and junior varsity: for intercholastic athletics, "levels of competition" refers to team levels, such as varsity, junior varsity, and freshman teams). In effectively accommodating the interests and abilities of male and female athletes, institutions must provide both opportunities for individuals of each sex to participate in intercollegiate or interscholastic1 competition, and for athletes of each sex to have Competitive team schedules which equally reflect their abilities.

The Policy Interpretation outlines three factors which may be considered consecutively to assess the opportunity for individuals of both sexes 10 compete in athletics programs.

1. Whether intercollegiate (or interscholastic] level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments.

2. Where the members of one sex have been and are underrrepresented among intercollegiate (or interscholastic] athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of that sex.

3. Where the members of one sex are underrepresented among intercollegiate (or interscholastic) athletes, and the institution cannot show a continuing practice of program expansion such u that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

1The Policy Interpretation is intended primarily to provide guidance for intercollegiate athletics programs. Much of this guidance also applies to interscholastic athletics. Throughout this program component section, where language of the Policy Interpretation is quoted or paraphrased, "interscholastic" is inserted in brackets where the same guidance or instructions apply.

Accommodation of Interests and Abilities

The Policy Interpretation outlines two factors which also must be considered to assess whether the quality of competition provided to male and female athletes equally reflects their abilities.

1. Whether the competitive schedules for men's and women's teams, on a program-wide basis. afford proportionately similar numbers of male and female athletes equivalently advanced competitive opportunities.

2. Whether the institution can demonstrate a history and continuing practice of upgrading the competitive opportunities available 10 the historically disadvantaged sex as warranted by developing abilities among the athletes of that sex.

INFORMATION TO COLLECT

Much of the information to be collected is the same for both secondary and postsecondary institutions. However, where the requests for data or the analysis would be different for interscholastic and intercollegiate athletics programs, separate entries are made for interscholastic and intercollegiate athletics.

Data Request

REQUEST the following information through the data request. (SEE sample data request at Tab B.)

1. Copies of written policies, procedures, and criteria for determining how and whether sports will be added to the men's and women's athletic programs; include copies of any reports discussing the growth of the athletics program, and copies of any surveys or assessments conducted of students' athletic interests and abilities, the dates(s) and results of the surveys or assessments

2. A list of all men's and women's teams (varsity, junior varsity, freshman, etc.) and all coed teams, including the division level at which each team competes and the date (month and year) each team began competition: also. a copy of the

eligibility or squad lists for the current year and the previous year for men and women for each team

3. The athletic association in which the men's and women's programs are members

4. A current list of club and intramural sports and the number of participants, by sex. participating in each club and intramural sport

5. Intercollegiate Programs: The number of full-time undergraduate students, by sex for the last two full semesters or quarters

Interscholastic Programs: The total number of students currently enrolled

Accommodation of Interests and Abilities

6 The competitive schedules for each team (request this OQJV if scheduling information is not obtained under the data request for another program component: in addition, be prepared to check, where appropriate, the NCAA or similar directory for division level of opponents)

RECORD this information on the interests and abilities chart.

On-site

Interview appropriate administrators, coaches, and participants. It may be necessary to identify someone with a knowledge of the sports history, with respect to the origin and development of teams, at the institution.

Interview Questions
Administrators:

1. Verify the dates the current men's and women's teams entered intercollegiate (or, interscholastic) competition, and determine the origin of these teams (e.g.. were the men's... sports previously club sports? Did the teams begin through the interest of a faculty member who desired to teach the sport?).

2. Obtain clarification, if necessary, on the practices and policies regarding determining whether sports will be added. Are any to be added? If so which ones? What are the reasons for the new additions? Have there been any unsuccessful attempts to add sports? Why were the attempts unsuccessful?

3. Have any sports, men's or women's, ever been eliminated? If so which sports and when? (If recent, obtain the number of participants affected.)

4. Does the current program fully and effectively accommodate the interests and abilities of participants? If so why? Are women or men permitted to try out for teams offered to the other sex? If so, have any women done so and made the men's teams?

5. Determine if interests and abilities have ever been surveyed. If so when? What were the survey results? Obtain a copy of all related documents that were not provided through the pre-on-site data request.

Coaches:

6. Using the appropriate eligibility or squad list, have the coach verify the actual number of participants.

7. Are you aware of any other sport in which there might be interest but which is not currently, being offered? If so, what sport? Have there been any unsuccessful attempts to add sports? Why were the attempts unsuccessful?

Accommodation of Interests and Abilities

8. Do you believe that the interests and abilities of both sexes are being fully and effectively accommodated? Why?

9. Is the level of competition appropriate for the team? Determine the division level of each opponent, if unable to obtain information from NCAA or other directory sources. (If the program component of scheduling is being investigated, do not include this question here. The interview questions for coaches and athletes under the scheduling program component

address this issue. Sec the manual section addressing Scheduling of Games and Practice Time.)

10. Coaches of coed teams only: Do women play regularly in season competition?

Athletes:

11. Are you aware of any other sport in which there might be interest but which is not currently being offered? If so what sport? Have there been any unsuccessful attempts to add sports? Why were the attempts unsuccessful?

12. What is your opinion of the quality of your competitive schedule? (Ask this question under scheduling, and not here. when the program component of scheduling is included in the '*' investigation.)

RECORD pertinent information on the interests and abilities chart.

ANALYSIS

Competitive Opportunities

Step One: COMPARE the number of male and female participants in the athletics program with the number of full-time undergraduate students (intercollegiate) or number of students (interscholastic). If the results arc substantially proportionate (for example, if the enrollment is 52% male and 48% female, then, ideally, about 52% of the participants in the athletics program should be male and 48% female), the recipient is effectively accommodating the interests and abilities of both sexes. If the calculation of enrollment to participation in the athletics program is not substantially proportionate, then go to step two.

There's no set ratio that "constitutes substantially proportionate" or that, when not met results in a disparity or a violation. All factors for this program component, and any justifications for differences offered by the institution, must be considered before a finding is made.

Step Two: DETERMINE when each men's and women's team began intercollegiate [or interscholastic competition and the origin of the sport. If any men's or women's sports have been eliminated, discuss the reasons they were eliminated and determine the number of participants that were on each team. DETERMINE the percentage of loss to each program. If spons have recently been added. INDICATE the number of participants affected and the percentage of gain to each program. DETERMINE whether there have been unsuccessful attempts to add teams, and why the attempts were unsuccessful. VERIFY plans for adding sports and whether the written policies, procedures, and criteria for determining whether sports will be added arc discriminatory in language or effect With these facts. DETERMINE whether the institution has shown a history and continuing practice of program expansion which has been demonstrably responsive to the developing interests and abilities of the underrepresented sex. If so it is not necessary to consider step three. If not go to step three.

Step Three: Once step three is reached, the determination for this •program component is complex and often difficult and may involve additional investigation. [The participation ratios are often not proportionate to the enrollment ratios for members of each sex and a history of program expansion for the underrepresented sex may not be apparent, thus leading to the question of whether the current program equally effectively accommodates student interests and abilities step three of the analysis for competitive opportunities. If the institution has not conducted a survey or used another method for determining interests and abilities and cannot demonstrate that the current program equally effectively accommodates interests and abilities then OCR must determine to what degree the current program accommodates interests and abilities The investigator should REVIEW whether the institution failed to accommodate "expressed interest." for example, athletes of the underrepresented sex participating in a club sport express interest in intercollegiate or interscholastic competition or sufficient numbers of individuals to form a team request that a sport be offered. If so, the recipient may be in violation (review carefully the Cautions section below before determining a violation). In addition, the investigator may consider reviewing other programs indicative of interests and

abilities, for example, club and intramural sports; sports programs at feeder schools; community and regional sports programs; and physical education classes. If this review demonstrates that there are sufficient interests and abilities in certain sports that are not offered by the institution 10 students of the underrepresented sex then the recipient may be in violation (again, review carefully the Cautions section below before determining a violation). Finally, the investigator should also REVIEW how the recipient met the developing interests and abilities in the program of the "overrepresented" sex.

Once this additional review has been completed. DETERMINE whether the current program equally effectively accommodates the current interests and abilities of male and female athletes. NOTE whether a survey or other method of assessing interests and abilities has been conducted. If so. provide the date and the results. If surveys or other assessment methods are to be conducted periodically. DETERMINE how these are to be conducted. If an assessment of interests and abilities has not been conducted. DETERMINE the origin of men's and women's sports and whatever method of determining interests and abilities was used. DETERMINE if the method used is effective. DETERMINE if the interests and abilities 01 both sexes are accommodated equally effectively.

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS
REGION VII
10220 North Executive Hills Boulevard, 8lh Floor
Kansas City, Missouri 64153-1367

OFFICE OF THE REGIONAL DIRECTOR

Dr. Eugene M. Hughes
President
Wichita State University
Wichita, Kansas 67208

Ref: 07932071

Dear Dr. Hughes:

This letter is to notify you of the determination of the Office for Civil Rights (OCR), U.S. Department of Education, regarding' the resolution of the above-referenced complaint filed against Wichita State University (University), Wichita, Kansas. "The complainant alleged that the University denied female athletes equal athletic opportunity on the basis of sex in its intercollegiate athletics program.

OCR's investigation was conducted under the authority of Title IX of the Education Amendments of 1972 (Title IX), as amended, 20 U.S.C. § 1681 et seq., and its implementing regulation at 34 C.F.R. Part 106. Title IX prohibits discrimination on the basis of sex in programs or activities receiving Federal financial assistance from the U.S. Department of Education. Athletics programs are specifically addressed at 34 C.F.R. § 106.41. The complaint contained allegations of discrimination in sufficient portions of the athletics program to invoke the directions of the Policy Interpretation issued December 11, 1979, 44 Fed. Reg. 71413 et seg. (1979).

Since the University is a recipient of Federal financial assistance, it is responsible for ensuring compliance with Title IX and its implementing regulation. Thus, OCR had jurisdiction to conduct this investigation.

The purpose of the investigation was to determine whether the University provides equal opportunity to male and female athletes in its athletics program. In accordance with the Policy Interpretation. OCR reviewed the University^ athletics program in the following major areas:

1. athletic financial assistance- 34 C.F.R. § 106.37 (c) and
2. (a) whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes - 34 C.F R § 106.41(c)(1); and

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OCR requested that the University provide information on its intercollegiate athletics program, including descriptions of athletics program policies and procedures, budgets, expenditure reports, athletic financial aid data, copies of competitive schedules, and lists of personnel and facilities for each team. OCR conducted an on-site investigation of the overall athletics program. The investigative team visited the athletics facilities and interviewed the Athletics Departments administrative staff, all men's and women's head coaches, some assistant coaches, and athletes from each of the intercollegiate teams.

SUMMARY OF PINDINGS

This summary is provided as a brief overview of the findings in this case. Enclosed with this letter is a more detailed Statement of Findings which provides specific findings of fact.

Athletic Financial Assistance

OCR found that during the 1992-93 academic year, female athletes at the University comprised 44.4 percent (83) of all participants in the intercollegiate athletics program and received 53.5 percent ($423,954.10) of the financial athletics assistance. Male athletes comprised 55.6 percent (104) of all participants and received 46.5 percent ($369,044.72) of the

financial assistance. During the 1993-94 academic year, female athletes at the University comprised 40.3 percent (77) of all participants in the intercollegiate athletics program and received 51.6 percent ($441,445.96) of the financial athletics assistance: Male athletes, comprised 59.7 percent (114) of all participants and received 48.4 percent ($414,060.13) of the financial assistance. The difference between the participation rates and the proportion of athletic financial assistance awarded to men and women constitutes a. significant disparity favoring female athletes.

OCR concludes that the University is not in compliance with the Title IX regulation at 34 C.F.R. § 106.37(c) with regard to athletic financial assistance.

Accommodation of Interests and Abilities

The University offers seven sports for male athletes and eight sports for female athletes. For the 1993-94 academic year/ women comprised 50.7 percent (3,278) of the full-time undergraduate students, and men comprised 49.3 percent (3,188). During the same year, women had 40.8 percent (107) of the opportunities to compete in the athletics program, while men had 59.2 percent (155). Additionally, there is no evidence of a history and continuing practice of program expansion for women, and the current program does not equally effectively accommodate the athletic interests and abilities of women. Male and female athletes were not provided with equivalent competitive opportunities in athletics during the 1993-94 year.

All of the men's and women's intercollegiate teams are members of the Missouri Valley Conference (MVC), and all teams compete at the National Collegiate Athletic Association (NCAA) Division I level. Interviews with coaches and athletes established that the levels of competition provided for male and female athletes are equivalent.

The disparity regarding equal opportunities to compete constitutes a violation of the Title IX regulation" at 3^ c F R § 106.41(c).

Other Program Areas

OCR found that the University is providing equivalent benefits, opportunities, and treatment to mats and female athletes in the area of tutoring. OCR found that the following program components were not equivalent for men and women: equipment and supplies, scheduling of games and practice times, travel and per diem allowance, coaching, locker rooms, practice and competitive facilities, medical and training facilities and services, housing and dining facilities and services, publicity, support services and recruitment of athletes. These disparities constitute a violation of the Title IX regulation at 34 C.F.R. § 106.4i(c).

The University has voluntarily submitted an Agreement for Corrective Act ion which, when implemented, will remedy the violations of the Title IX regulation at 34 C.F.R. §§ 106 37 (c) and 106.41(c). The Agreement is enclosed with this letter.

OCR will monitor the implementation of the University's Agreement to ensure Chat it is fully implemented. Continued compliance with the Title IX regulation is contingent upon OCR's receipt of documentation showing completion of the actions planned by the University. Failure to implement the corrective action may result in a finding of violation. This determination is not; intended and should not be construed to cover any other issues regarding compliance with the Title IX regulation which may exist but are not specifically discussed herein.

In accordance with agency procedures, we are required to inform all parties that intimidation or retaliation by recipients of Federal financial assistance is prohibited. No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by the laws OCR enforces, or because one has made a complaint, testified, assisted, or participated in

STATEMENT OF FINDINGS
Docket No. 07932071
ATHLETIC FINANCIAL ASSISTANCE - 34 C F.R. § 106.37(c)

The Title IX regulation at 34 C.P.R. § 106.37 (c) provides that recipients must provide reasonable opportunities for awards of athletic scholarships or grants-in-a id for members of each sex in proportion to the number of athletes of each sex participating in intercollegiate athletics. Under the December 11, 1979, Policy Interpretation, OCR examines compliance with this section of the regulation by means of a financial comparison to determine whether proportionately equal amounts of financial assistance (scholarship aid) are available to men's and women's athletics programs. OCR measures compliance with this standard by dividing the amounts of aid available for the members of each sex by the numbers of male and female participants in the athletics program and comparing the results. Institutions may be found in compliance if this comparison results in substantially equal amounts or if a resulting disparity can be explained by adjustments to take into account legitimate, nondiscriminatory factors.

Participants are defined as these athletes:

a. who are receiving the institutionally- sponsored support normally provided to athletes competing at the institution involved, i.e., coaching, equipment/medical and training room services, on a regular basis during a sport's season; and

b. who are participating in organized practice sessions and other team meetings and activities on a regular basis during a sport's season; and

c. who are listed on the eligibility or squad lists maintained for each sport; or

d. who because of injury, did not meet a, b, or c above, but continued to receive financial aid on the basis of athletic ability.

To establish the number of participants, OCR examined the NCAA squad lists and MVC eligibility lists prepared by the University for the 1992-93 and 1993-94 academic years. These

lists were reviewed with head coaches and other athletics program staff. Students who did not meet the definition were not included in the count. Also, any athlete who emit the team prior to the first competitive event and never received financial aid was not included in the count. Athletes participating in more than one sport were counted only once.

Conclusion

OCR found a disparity favoring female athletes. The athletic financial assistance made available to men and women for the 1992-93 and 1993-94 academic years was not substantially proportionate to their participation rates in the intercollegiate program.

OCR also found a disparity favoring male athletes. Men's basketball athletes attending summer school receive money for tuition and fees as well as for room and board/ while all other athletes only receive money for tuition and fees.

The university is not in compliance with the Title IX regulation at 34 C.F.R. §106.37(c).

EFFECTIVE ACCOMMODATION OF STUDENT INTERESTS AND ABILITIES - 34 C.F.R. § 106.41(c)(1)

The Title IX regulation requires institutions to effectively accommodate the interests and abilities of students to the extent necessary to provide equal opportunity in the selection of sports and the levels of competition available to members of both sexes.

Ineffectively accommodating the interests and abilities of male and female athletes, institutions must provide the opportunity for individuals of each sex to participate in intercollegiate competition and to have competitive team schedules that equally reflect their abilities.

OCR's determination involves a two-part analysis regarding: (1) equal opportunities to compete, and (2) levels of competition.

Equal Opportunities to Compete

OCR considered three factors consecutively to address equal opportunities to compete. In accordance with OCR policy a recipient will be found in compliance with Title IX regarding participation opportunities for male and female athletes if it meets any part of the three-part test used below.

1. Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments.

For the purposes of this program area, participation rates were counted according to the number of participation opportunities available for male and female athletes. For example, indoor track, outdoor track, and cross country were considered as three separate participation opportunities.

1992-93 Participation Rates:	Men - 137 (55.2 percent) Women - 111 (44.8 percent)
Full-time Undergraduate Enrollment Rates:	Men - 3,339 (49.6 percent) Women - 3,396 (50.4 percent)
1993-94 Participation Rates:	Men - 155 (59.2 percent) Women - 107 (40.8 percent)
Full-time Undergraduate Enrollment Rates:	Men - 3,188 (49.3 percent) Women - 3,278 (50.7 percent)

According to z-tests performed by OCR, the University was providing participation opportunities for male and female students in numbers substantially proportionate to their respective enrollment in 1992-93, but not in 1993-94. For the year 1993-94, women were underrepresented in the intercollegiate athletics program.

2. Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsible to the developing interests and abilities of that sex.

The University is a member of Division I of the NCAA and the MVC. In 1992-93 and 1993-94, the University offered 15 intercollegiate sports; seven for men and eight for women.

SPORTS OFFERED

Men	Women
Baseball	Softball
Basketball	Basketball
Golff	Golf
Tennis	Tennis
Cross Country	Cross Country
Track (Indoor)	Track (Indoor)
Track (Outdoor)	Track (Outdoor)
	Volleyball

Beginning in 1968, the University first sponsored competitive women's sports at the club level. On July 1, 1974, the University's women's intercollegiate athletics program was rounded and became a member of the Association of Intercollegiate Athletics for Women (AIAW) and the Kansas AIAW. The merger of the men's and women's athletics programs began in 1980. In 1981-82, the women's programs moved from membership in the AIAW, then disbanding, to the NCAA. Prior to 1987, when football was dropped as a sport, the University had a balance in the men's and women's athletics teams with eight each. No women's sport has ever been eliminated. The last sport added for women was in 1983.

The evidence does not demonstrate a history and continuing practice of program expansion for women, who are underrepresented in the intercollegiate athletics program.

3. Where the members of one sex are underrepresented among intercollegiate athletes, and me institution cannot Show a

continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of chat sex have been fully and effectively accommodated by the present program.

OCR's review of the intramural and club sports established they are operated separately from the intercollegiate athletics program at the University. The intramural and club sports with the highest participation rates are: volleyball (283 participants, 227 men and 56 women); softball (328 participants, 284 men and 44 women); basketball (407 participants, 370 men and 37 women); crew (69 participants, 34 men and 36 women) soccer (194 participants, 167 men and 27 women); racquetball -(47 participants, 36 men and 11 women); badminton (15 participants, 11 men and four women).

In July 1992, the President's Task Force on Intercollegiate Athletics issued a report to the University President. In this report, the Task Force stated that it favored the raising of soccer and swimming to varsity levels, based on interest among area youth, the availability of facilities on campus, and competitive opportunities within the Missouri Valley Conference.

OCR finds that the current intercollegiate athletics program does not equally effectively accommodate the athletic interests and abilities of women as the underrepresented sex, because there is sufficient interest abilities by women, and sufficient competition in the University's normal competitive area to offer women's intercollegiate soccer and swimming.

Levels of Competition

OCR considered two factors in assessing the levels of competition provided:

1. Whether the competitive schedules of the men's and women's teams on a program-wide basis, afford proportionately

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AGREEMENT AND PLAN FOR CORRECTIVE ACTION
Wichita State University
07932071

Wichita State University (University), Wichita, Kansas, submits the following agreement to the U. S. Department of Education, Office of Civil Rights (OCR), to resolve the compliance problems regarding the regulations implementing Title IX of the Education Amendments of 1972 which have been identified by OCR during the course of the investigation of Complaint No. 07932071.

1. In order to provide equivalent athletic financial assistance under 34 C.F.R. Section 106.37 (c), the University will taJce the following actions.

   a. By July 1, 1998, the University will provide athletic financial assistance to male and female athletes at a rate as substantially proportionate as possible to their participation rate in the intercollegiate athletics program, while maintaining compliance with NCAA and applicable conference rules and regulations.

      Beginning July 1, 1996, and continuing annually each July 1 until July 1, 1998, when all programs have the maximum number of grants-in-aid using the 1995 NCAA rules as a guideline, the University will provide to OCR copies of expenditure reports showing the amount of athletic financial aid provided to male and female athletes, as well as copies of squad lists for each team for the corresponding year.

      - Because of existing NCAA legislation which has been designed to promote ' increased opportunities for women in intercollegiate athletics, it will be virtually impossible to correct the disparity favoring female athletes in the awarding of financial assistance. In order to increase the participation rate of women at Wichita State, it will be necessary to increase scholarship funding, particularly in the track program. The

University is currently offering nearly 93 percent of the NCAA maximum allowable financial aid to male athletes. Even if this percentage is increased to the maximum, the disparity favoring women will still exist.

To address the proportionality issue to the greatest degree possible while maintaining compliance with NCAA rules/scholarship offerings for male athletes will be increased to 100 percent of the maximum allowable within the next two years (per 1995 NCAA rules). Scholarship offerings for female athletes will be increased to the level necessary to reach proportionality between men and women in opportunities to compete in intercollegiate athletics. A total of 19 grants-in-aid will be added over a three year period, five for the 1995-96 academic year, seven for the 1996-97 academic year, and seven the 1997-98 academic year. This increase (3.3 for men and 16.0 for women) will result in all sports programs receiving the maximum financial aid allowed by the NCAA, using the 1995 rules as a guideline. The figures below represent the planned increases for each sports program.

a. By July 1, 1997, beginning with the academic year 1997-98, the University, will provide athletic participation opportunities for male and female athletes at a rate substantially proportionate to the enrollment rate of male and female full-time undergraduate students at the University.

The University realizes that the Title IX regulation provides three options for compliance with the regulation, which requires institutions to provide individuals of each sex the opportunity to participate in intercollegiate competition. These options include: 1) offering athletic opportunities to male and female students that are substantially proportionate to their respective enrollments, 2) showing a continuous history of expanding athletic opportunities for women; or 3) fully and effectively

accommodating the interests and abilities of females as the underrepresented sex. The University has voluntarily chosen the first option as its method of coming into compliance.

Beginning July 1,1996, and continuing annually each July 1 until July 1, 1998, when the student-athlete population is substantially proportionate to the student body population, the University will provide to OCR documentation regarding the enrollment rate of male and female full-time undergraduate students at the University, as well as copies of squad lists for each team for the corresponding year.

Within the next two years, efforts will be made to dramatically increase participation of women athletes and slightly decrease participation of male athletes so as to achieve a ratio that is substantially proportionate to the student body population (currently approximately 50/50). The chart below demonstrates how this can be accomplished within the existing program. These numbers are simply a guide. The actual numbers will likely fluctuate from year to year. It will be the responsibility of the director of athletics to monitor recruiting activities and assist coaches with reaching and maintaining appropriate squad sizes so that the overall participation rate of men and women in the athletic program is substantially proportionate to the institution's full-time undergraduate enrollment.

PARTICIPATION OPPORTUNITIES

MEN	1993-94 NCAA Average	1994-95 WSU	Proposed 1997-98	Net Change
Baseball	34.6	29	30	+1
Basketball	14.8	17	15	-2
Golf	12.2	17	9	-8
Tennis	10.8	9	8	-1
Track	36.6	35	30	-5
Total - Men	109	107 (58.8%)	92 (50%)	-15

WOMEN	1993-94 NCAA Average	1994-95 WSU	Proposed 1997-98	Net Change
Softball	17.8	17	19	+2
Basketball	13.8	13	15	+2
Golf	8.5	8	9	+1
Tennis	9.4	7	8	+1
Track	27.1	19	28	+9
Volleyball	12.9	11	13	+2
Total - Women	89.5	75 (41.2%)	92 (50%)	+17
TOTAL Men and Women	198.5	182	184	+2

The most dramatic increase in participation will be in women's track. The current coaching staff believes the numbers are attainable if more financial aid is made available. As indicated in the previous section, a full compliment of scholarships in women's track will be provided within the next two years. Because of the increase in numbers and the need to promote retention of student-athletes, an additional coaching position will be added as well as filling the position that has been vacant for nearly a year. Every effort will be made to identify qualified females for the vacant position because coaches currently involved with the program are male. It will also be necessary to identify additional recruiting funds to be used to attract more female track athletes.

There are also less significant increases planned for the other women's programs. Again, the coaches feel the increases are possible with increased dollars dedicated to recruiting as well as additional scholarship dollars as noted above. On the men's side, the most significant decrease will be in the golf program. The numbers have been higher than the NCAA average in this program and a decrease will make the program more manageable by a single coach. In the other men's programs, a minor decrease should not hurt the competitive ability of any of

the teams. An appropriate tryout period will be made available to students interested in any of WSU's sports • programs.

b. The university will ensure that as the women's participation opportunities increase, the athletic financial assistance awarded to the women's and men's programs will remain as substantially proportionate as possible to the participation rates of women and men in the intercollegiate athletics program while maintaining compliance with NCAA and applicable conference rules and regulations. Additionally, the University will ensure that the funding for the recruitment of women athletes increases to become more substantially proportionate to the rate of participation of women and men in the intercollegiate athletics program.

Supreme Court, U.S.
FILED
AUG 0 4 2003
OFFICE OF THE CLERK

No. 03-32

In The
Supreme Court of the United States

STEPHEN NEAL, et al.,

Petitioners,

v.

THE BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTIONS PRESENTED

1. Whether a university engages in gender-based discrimination in violation of Title IX, 20 U.S.C. § 1681(a), when it provides athletic opportunities to men and women in substantial proportion to the student body's overall gender composition.

2. Whether a university denies equal protection under the law, redressable under 42 U.S.C. § 1983, when it provides athletic opportunities to men and women in substantial proportion to the student body's overall gender composition in order to achieve equal opportunity for women.

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PRELIMINARY STATEMENT

College athletes have been litigating Title IX in the federal courts for many years, and rarely have courts met disputed issues with such unanimity. Every Circuit (and there have been many) to consider the gender issues inherent in college athletics has held that allocating men's and women's athletic roster spots in substantial proportion to overall student enrollments is consistent with Title IX and the Constitution. In nearly all of those cases, parties have petitioned this Court for writs of certiorari, and this Court has in every instance declined to step in.

This case is no different from those that came before it. In 1993, Respondent California State University Bakersfield ("CSUB") found itself with a profound imbalance in its athletic program. Thus, over the last ten years, CSUB has carefully increased women's participation in athletics, while simultaneously controlling men's participation. The result is an athletic program that allocates opportunity in an even-handed manner and roughly reflects the gender makeup of the student body as a whole. Overall, the program is larger and more diverse than it has ever been.

Considering the agreement among the courts, the Ninth Circuit's affirmation of CSUB's gender-proportionate program was neither surprising nor noteworthy. The opinion created no disagreement in the law, and instead presented the Ninth Circuit's faithful application of uniformly recognized rules to the ordinary facts of this case. In short, there is no reason, let alone a "compelling reason," for this Court to grant discretionary review. *See*

S. Ct. R. 10. Respondents therefore respectfully request that this Court deny the petition for a writ of certiorari.

STATEMENT OF THE CASE

In 1993, men took 61 percent of CSUB's athletic roster spots and 68 percent of available scholarship money, despite making up only 40 percent of the athletics-eligible student body. Thus, under pressure from women's interests, conference requirements, and a shrinking budget, CSUB implemented a long-term plan to bring its athletic program into a more appropriate balance.

CSUB was reluctant to eliminate any of its existing men's and women's teams, including the wrestling team. It therefore adopted a system of squad size targets that would encourage expansion of the women's teams, while simultaneously controlling the size of the men's teams. Under the squad size program, the university gave each men's team a maximum size, while women's teams received a requested minimum. The plan also called for adding more sports.

Over the next eight years, CSUB more than doubled the projected number of women playing on its athletic teams — an increase from 83 to 177 women, against a net reduction of just 3 male participation opportunities. During that time, CSUB added sports for both men and women, and it has kept every team that it had when it commenced its squad size program. Thus, in the end, CSUB's planning resulted in more students playing a wider range of sports.

Although the wrestling team remained CSUB's largest men's team in any sport, the wrestlers and their supporters filed this lawsuit claiming that they were *legally entitled* to more participants. According to the wrestlers, the *only* lawful manner in which universities can allocate men's and women's roster spots is according to men's and women's relative interests. Several Circuits had rejected that argument because it finds support neither in Title IX nor in the relevant regulations. The Ninth Circuit likewise rejected Petitioners' argument as unfounded and affirmed summary judgment in CSUB's favor. This petition followed.

REASONS WHY THE PETITION SHOULD BE DENIED

A. Every Circuit To Address The Issue Has Determined That Title IX And The Constitution Allow Universities To Allocate Athletic Opportunities In Substantial Proportion To Men's And Women's Student Enrollments

In the last eleven years, seven Circuit Courts of Appeals have addressed issues of gender discrimination in college athletics. These courts have been unanimous in holding that universities retain the discretion under Title IX and the Constitution to allocate their men's and women's athletic roster openings in substantial proportion to their overall student enrollments.

The first appellate case to address the issue was *Cohen v. Brown University*, 991 F.2d 888 (1st Cir. 1993), where the First Circuit held that an athletic program that allocated a disproportionate number of participation opportunities to

men violated Title IX. *Id.* at 905-06. In so holding, the First Circuit applied the Department of Education's administrative guidelines on college athletics – known as the Policy Interpretation – and ruled that allocating men's and women's roster spots in proportion to enrollments was perfectly consistent with Title IX. *Id.* at 897-98. Three years later, when the case returned to the First Circuit following final judgment, the court reaffirmed the substantial proportionality standard and observed that "[r]ather than create a quota or preference, this unavoidably gender-conscious comparison merely provides for the allocation of athletics resources and participation opportunities between the sexes in a non-discriminatory manner." *Cohen v. Brown Univ.*, 101 F.3d 155, 177 (1st Cir. 1996). This Court denied the subsequent petition for a writ of certiorari. *Brown Univ. v. Cohen*, 520 U.S. 1186 (1997).

Since *Cohen*, six other Circuits have considered issues involving alleged gender discrimination in college athletics, including in "reverse discrimination" lawsuits brought by male athletes. In every case, the Circuits have upheld substantial proportionality as a fair and legal standard for allocating athletic opportunities. *See Pederson v. Louisiana State Univ.*, 213 F.3d 858, 878 (5th Cir. 2000) (Department of Education's policy guidelines, including the substantial proportionality standard, provide the "proper analytical framework for assessing a Title IX claim."); *Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d 608, 615-16 (6th Cir. 2002) (holding that eliminating men's wrestling, tennis, and soccer teams for the purpose of reaching gender proportionality violated neither Title IX nor the Constitution, since the university had merely "equalized the athletic opportunities for men and women."); *Horner v. Kentucky High School Athletic Ass'n*, 43 F.3d 265, 275 (6th

Cir. 1994) ("An institution need not pour ever-increasing sums into its athletic programs in order to bring itself into compliance, but has the option of reducing opportunities for the overrepresented gender while keeping opportunities for the underrepresented gender stable."), *appeal after remand*, 206 F.3d 685 (6th Cir. 2000), *cert. denied*, 531 U.S. 824 (2000); *Boulahanis v. Board of Regents*, 198 F.3d 633 (7th Cir. 1999) (holding that eliminating men's wrestling and swimming teams to achieve gender proportionality violated neither Title IX nor the Constitution, so long as men continued to receive roster spots in substantial proportion to overall male student enrollment), *cert. denied*, 530 U.S. 1284 (2000); *Kelley v. Board of Trustees*, 35 F.3d 265, 270 (7th Cir. 1994) (holding that eliminating men's swimming team did not violate Title IX because men continued to be "more than substantially proportionate to their presence in the University's student body."), *cert. denied*, 513 U.S. 1128 (1995); *Chalenor v. University of North Dakota*, 291 F.3d 1042, 1047 (8th Cir. 2002) (eliminating wrestling team did not violate Title IX because the statute permitted the reduction of men's programs to achieve gender proportionality); this case, *Neal v. Board of Trustees*, 198 F.3d 763, 773 (9th Cir. 1999) (joining its "sister circuits in holding does not bar universities from taking steps to ensure that women are approximately as well represented in sports programs as they are in student bodies."); *Roberts v. Colorado State Bd. of Agriculture*, 998 F.2d 824, 830 (10th Cir. 1993) (universities may "comply with Title IX by cutting athletic programs such that men's and women's athletic participation rates become substantially proportionate to their representation in the undergraduate population"), *cert. denied*, 510 U.S. 1004 (1993).

In the above cases, every time a party petitioned for a writ of certiorari, this Court denied the petition, as it did in *Cohen*.

Petitioners begrudgingly admit that there is no conflict among the Circuits (on page 29 of their 30-page petition), but they give two equally flawed reasons why this Court should grant their Petition anyway. First, Petitioners assert that *all* the Circuits are wrong and that only this Court can stop the runaway train. But as this Court understands better than any other, the federal Courts of Appeals do not follow each other blindly, nor do they hesitate to depart from one another when the law and the record convinces them that they ought to. Indeed, if the Courts of Appeals were the mindless "railway cars" that Petitioners make them out to be, this Court would not have written its rules to make Circuit splits the *first* reason for granting certiorari *See* S. Ct. R. 10(a).

Second, Petitioners point out that two district courts have "rejected proportionality" in college athletics. But Petitioners do not fully acknowledge, as they should have, that both those district courts were reversed. *See Neal v. Board of Trustees*, No. CV-F-97-5009 REC, Order Granting Plaintiffs' Motion for Preliminary Injunction (E.D. Cal. Feb. 22, 1999), *rev'd*, 198 F.3d at 773; *Pederson v. Louisiana State Univ.*, 912 F. Supp. 892 (M.D. La. 1996), *rev'd*, 213 F.3d 858 (5th Cir. 2000).

The reason why the Circuits are unanimous on the issues presented here is that the law is clear and without genuine controversy. Title IX prohibits gender discrimination in educational programs, and giving each gender a share of athletic roster spots roughly equal to its representation in the overall student body is even handed and non-discriminatory. Thus,

court after court has held that the substantial proportionality benchmark is useful and consistent with Title IX, its regulations, and their mandate of equal opportunity.

In sum, the Courts of Appeals for the First, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits have faithfully and consistently applied Title IX and the Constitution to college athletics, and they have done so in deference to the Department of Education's own interpretation of Title IX and its regulations. There is no reason, let alone a compelling reason, for this Court to add to this body of law.

B. The Record Here Does Not Provide A Vehicle To Adjudicate The Administrative Policy That Petitioners Have Asked This Court To Review, Nor Does It Clearly Support A Key Factual Predicate To The Issues Presented

Although this case began with the 1994 reduction in the wrestling team's size, CSUB's program in the long run has resulted in no substantial reduction in opportunity for male athletes at CSUB. In 1993, CSUB had 116 men on its athletic teams, compared with 113 in 2001, a difference of just three opportunities. As a result, the factual predicate behind Petitioners' arguments – that CSUB "eliminated" male athletic opportunities to achieve gender proportionality – is not clearly presented on this record.

Moreover, and more importantly, the Petition asks this Court to review a three-part administrative policy – the Department of Education's Policy Interpretation – when two of its parts are irrelevant to this case and were not considered below. The courts below considered *only* whether establishing substantial gender proportionality in

CSUB's athletic program violated Title IX and the Constitution. And they held that CSUB's program passed muster in every way. In so holding, the lower courts relied on *one part* of the Policy Interpretation's three-part guideline on college athletics.

Petitioners nevertheless urge this Court to review the Department's Policy Interpretation in its entirety — *all three parts*, even though the second and third parts are irrelevant to this case and were not applied below. It is a request to review an administrative policy in the abstract, which federal courts do not do. *See Flast v. Cohen*, 392 U.S. 83, 96 (1968) ("[I]t is quite clear that the 'oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions.'").

The district court and Ninth Circuit recognized as much and declined similar invitations. The district court did so expressly: "The court does not see the need to determine in this litigation if parts two or three of the [Policy Interpretation] are entitled to substantial deference. . . . Because part one of the Three-Part Test is entitled to substantial deference and that is the part with respect to which CSUB proceeded, *the court [is] being asked to make an advisory opinion about the legality of the other two parts.*" (App. 61 (emphasis added))

The prudential limitations expressed by this Court in *Flast* and by the courts below are particularly apposite to this case. This lawsuit began more than six years ago and has undergone a Rule 12(b) motion, preliminary injunction proceedings, cross-motions for summary judgment, two appeals, and a remand. The record is therefore long and complicated. Yet despite its length and the parties' full opportunity to address issues presented, there was still no

comprehensive application below of the Policy Interpretation to CSUB's athletic program. Plaintiffs tried to fill this gap by submitting hundreds of Department of Education documents showing the application of the Policy Interpretation to *other universities*. But that merely cluttered the record further.

In the end, the prohibition on advisory opinions is particularly applicable where, as here, a petition raises issues that were not presented below, were not fully briefed by both sides, and were not addressed by the lower courts. This Court need not and should not intervene for this independent reason as well.

CONCLUSION

The Courts of Appeals agree that the kind of allocation of athletics resources and roster openings undertaken by Respondents in this case does not violate Title IX or the Constitution. In sum, nothing about this case is noteworthy, nor have Petitioners presented a compelling reason for this Court to exercise its discretionary power of review. Accordingly, the Court should deny Petitioners' petition for a writ of certiorari.

Dated: August 4, 2003.

Respectfully submitted,

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